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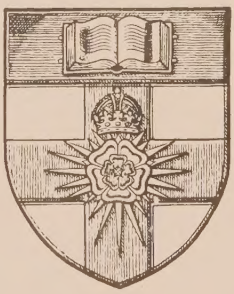

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THE

LAW REPORTS.

English and Irish Appeal Cases

AND

Claims of Peerage

BEFORE

THE HOUSE OF LORDS

REPORTED BY CHARLES CLARK, BARRISTER-AT-LAW,
BY APPOINTMENT OF THE HOUSE OF LORDS.

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Appeal Cases

BEFORE

THE HOUSE OF LORDS.

ENGLISH AND IRISH APPEALS.

ROBERT GRAY AND JOHN TREW GRAY . APPELLANTS; 1868

AND *March* 10.

GEORGE JOSEPH JOHNSTON . . . . . RESPONDENT.

Bankers—Executors—Trust Fund.

In order to hold a banker justified in refusing to pay a cheque of his customer, the customer being an executor, and drawing a cheque as executor, there must be a misapplication of the money intended by the executor, so as to constitute a breach of trust, and the banker must be cognisant of that intention.

The existence of a personal benefit to the banker, designed or stipulated for, as a consequence of the payment, would be strong evidence that the banker was privy to the breach of trust.

R. G. & Co., bankers, had acted as such to *T. J.*, who carried on business with his son-in-law under the style of *J. & M.*, but whose accounts with them were kept in his own name alone, and were unsettled at his death. He left a will, bequeathing all his property to the use of his wife for life, and after her death to be divided among their children as she might think fit; part of the property consisted of life policies which were put into the hands of the bankers, together with the probate of *T. J.*'s will, and they received the amount of the policies, made up their accounts, and, after deducting their own unsettled claims, declared a certain sum to remain due from themselves to the executrix. She continued her husband's business with his late partner under the style of *J. & M.*, and a new account was opened with the bankers in the name of the new firm, and she, as executrix, drew a cheque for the amount stated to be due to her, and paid it in to the bankers to be credited to the firm of *J. & M.*, and it was so credited and paid out, with other money, on account of cheques drawn by the new firm:—

Held, that these circumstances were not, in themselves, sufficient to shew

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that a breach of trust had been committed, and that the bankers knew of the intention to commit it, so as to render them liable (in a suit by the children of the testator) to replace the money.

THIS was an appeal against a decretal order of the Court of Chancery in *Ireland*, made on the 15th of January, 1866.

The Appellants were bankers in *Dublin*. The Respondent was one of the children of one *Thomas Johnston*, who had formerly carried on business there as a silk mercer. In the year 1854, *Samuel Mayston* married one of *T. Johnston's* daughters, and immediately afterwards entered into partnership with him. The business was continued by the firm of *Johnston & Mayston*. The Appellants acted as their bankers; but the banking account appeared to have been kept in the name of *Johnston* alone. *T. Johnston* deposited with the Appellants four policies of insurance of £1000 on his own life, as security for advances to be made to the firm. The business was not prosperous, and at *Johnston's* death, which occurred on the 29th of June, 1859, it was doubtful whether he was or was not insolvent. He left a will in these words: "I give and bequeath to my dear wife, *Ellen Johnston*, all my right, title, and interest in and to my premises known as No. 14, *Upper Sackville Street*, in the city of *Dublin*, in which I now carry on business with Mr. *Samuel Mayston*, with all my other property of every nature and kind whatsoever and wheresoever, which I now am or may hereafter become possessed of and entitled to, to be divided amongst my children and grandchildren at her death, or sooner if she think fit, as to her may seem most to their advantage, and I appoint my said dear wife sole executor (*sic.*) of this my will."

The widow continued the business with *Mayston*. She handed to the Appellants the will of the deceased, and it remained in their possession for some days. A new banking account was opened with the Appellants in the name of the new firm, the first entry in which appeared as that of the 1st of July, 1859. The will was returned to Mrs. *Johnston*, who obtained probate of it, and then handed the probate to the Appellants to enable them to obtain the money due on the life policies. This money was not the full sum of £4000, but a balance of £3683 6*s.* 8*d.*, after satisfying certain claims of the insurance company. She received from the Appellants on this occasion the following note:—"Madam,—To enable

me to receive the amount you have this day, at my request, signed as his executrix, receipt for the sum of £3683 6*s.* 8*d.*, payable to you on policies effected with the *United Kingdom Assurance Company* on the life of your late husband Mr. *Thomas Johnston*, out of which sum I have to retain the amount due to me at foot of my account with *Johnston & Mayston* on 23rd October next, and I undertake to pay over to you the balance of said insurance money. Yours obediently, *Robert Gray & Co.*" The Appellants received the money payable by the insurance office, and on the 21st of October, 1859, rendered an account, by which the balance struck as due by them on that day to Mrs. *Johnston* was £853 17*s.* 5*d.* This money was not, in fact, paid over to her, but on the 1st of November, 1859, she signed an ordinary cheque in these words: "*Robert Gray & Co.*, pay *Johnston & Mayston* eight hundred and fifty-three pounds seventeen shillings and fivepence. *Ellen Johnston*, as administratrix (*sic.*) of the late *Thomas Johnston.*" This cheque, indorsed "Lodged for account of *Johnston & Mayston*, 9th November, 1859," was paid on that day into the Appellant's bank, and the money due on it appeared to have formed part of the account of the firm of *Johnston & Mayston*, and not to have been the subject of any particular appropriation.

On the 12th of November, 1864, the Respondent, as one of the children of the late *Thomas Johnston*, filed his Cause Petition against Messrs. *Gray*, and also against Mrs. *Johnston*, charging that on the 30th of June, 1859, the former firm of *Johnston & Mayston* was indebted to the bankers in £2486 12*s.* 2*d.*, which, being deducted from the sum received on the policies, left a balance of £1196 14*s.* 6*d.*, which was a part of the assets of the deceased, and subject to the provisions and trusts of his will, "of all of which your Petitioner charges the said *R. G.* and *J. T. G.* had full notice." He then alleged that they had afterwards added sums to their own account which reduced the balance to £853 17*s.* 5*d.*; he set forth the cheque, and charged that the said sum was applied in liquidation of debts contracted by the new firm with the *Grays*, "and that such application was a breach of trust on the part of *Ellen Johnston*, and that the said *R. G.* and *J. T. G.* had full notice of such breach of trust and participated therein." The prayer of the Cause Petition was,

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"that the said sum of £1196 14*s.* 6*d.* may be declared to be assets of the testator *Thomas Johnston;* that *R. Gray* and *T. J. Gray* may be ordered to replace and make good the said sum to the estate of the testator, and that the trusts of the will may be carried into effect," and for farther relief.

The Messrs. *Gray,* in their answering affidavit, stated that up to the death of *T. Johnston* the dealings with the firm had been in the name of *T. Johnston* alone; that they believed he was insolvent at the time of his death; that for months before his death he had been unable from ill health to attend to business; that on his death, without any interruption or apparent change, the business was carried on as usual by his widow and his son-in-law; that a new account was then opened of *Johnston & Mayston;* that they received the probate of the will merely to get the money through their *London* agents from the insurance office, but that they "did not regard or retain in their recollection the purport or contents of the will," but always believed, and her solicitor so stated, that the widow had full power and control over her husband's estate and effects; that she acted wisely in continuing the business; and that if the business had been terminated at *T. Johnston's* death there would have been no assets whatever. They alleged that the cheque for the £853 17*s.* 6*d.* had been given in the ordinary way; that it was lodged to the credit of *Johnston & Mayston;* and they submitted that "they had not any power or authority to decline to pay or apply the balance of £853 17*s.* 6*d.*, as the said *Ellen Johnston* might direct." They denied that there was any law or custom of bankers to take notice of any trusts, and, on the contrary, they affirmed that they were bound to honour the drafts of their customers, and were not bound to inquire into the application of money drawn from current accounts; they denied all knowledge of breach of trust, and they alleged that they placed the draft for £853 17*s.* 5*d.* to the credit of *Johnston & Mayston* without fraud, and in the usual course of business.

Affidavits were filed on both sides, and the cause was heard before Lord Chancellor *Brady,* who, on the 15th of January, 1866, made an order in accordance with the prayer of the Petition, except that the sum ordered to be paid was not £1196 14*s.* 6*d.* as mentioned in that Petition, but £853 17*s.* 5*d.*, which was the final

balance struck before the drawing of the cheque (1). This was an appeal against that order.

Mr. *Lawson*, Q.C. (of the Irish Bar), and Mr. *De Gex*, Q.C., for the Appellants:—

All that was done here was in the ordinary course of business. There was no preconcert, nor anything which in any way could give rise to an allegation of fraud, and none was made. There was nothing even in the Cause Petition itself to shew that the sum of £853 17*s.* 5*d.* was not used in discharge of the debts of the testator. The widow had a perfect right to draw the cheque, and the bankers were bound to honour it. The will itself gave her a life interest in the property with a power of division or appointment among the children at her pleasure.

The order itself is erroneous; it treats this money as part of the assets of *T. Johnston*, which it was not competent for the Court to do, until by evidence it had been ascertained, on a previous inquiry, that in fact there was a residue; and if there was none, there could be nothing on which to ground a trust. Even if there had been, the bankers were not bound to look to the application of the money. [THE LORD CHANCELLOR (Lord *Cairns*):—There might be an action against a banker for not honouring a cheque. Could he apply for an injunction to stay the action on the ground that he suspected the money for which the cheque was drawn was money paid in in breach of a trust?] There is that difficulty. All the cases shew that without preconcert, and knowledge of an intended breach of trust, a banker cannot be held liable. In *Hartga* v. *The Bank of England* (2) bank stock was specifically bequeathed to *A* in trust, to pay a bond debt due to himself, the rest to *B.* for life, remainder over. *A.* was also executor, and he transferred the fund to persons not entitled under the will. Because the bank had no power to prevent the transfer of the money to the executor, and none afterwards to prevent his drawing it out, the bank was held not to be chargeable. And in *The Bank of England* v. *Parsons* (3) where the bank sought to stay an action for not allowing stock to be transferred, on the ground that the transfer would be against the trusts of a will, the Lord Chancellor refused the injunc-

(1) 11 Ir. Jur. (N.S.) 83. (2) 3 Ves. 55. (3) 5 Ves. 665.

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tion on the ground that the bank was not to look beyond the legal title to the trusts of the will, and, therefore, could not prevent the executor from transferring stock in his own name. Here that title was perfect in Mrs. *Johnston*, and the Appellants had no right to inquire farther. In the Court below the case of *Wilson* v. *Moore* (1), where the correspondents of a mercantile firm were held responsible for misapplication, by the executors, of the testator's assets, was much relied on. But that case, both in the original judgment of the Master of the Rolls, and in the affirmance of it by Lord Chancellor *Brougham*, is really a strong authority for the Appellants. For in both instances the liability was declared to be founded on the actual knowledge of, and participation in, the misapplication. Nothing of the kind is shewn, or even alleged, here. The same observation is applicable to *Pannell* v. *Hurley* (2), and to *Bodenham* v. *Hoskyns* (3). On the other hand, in *Keane* v. *Robarts* (4) the bankers not being privy to any intention of misapplication were held not liable. [THE LORD CHANCELLOR:—In the Court below the decision seems to have proceeded on the ground that there was knowledge of the trusts, and knowledge that the executrix was committing a breach of trust.] There was no trust affecting the fund till the debts were paid, and there is no reason for saying that the bankers knew the debts of the testator to have been paid, or whether there was money enough to pay them. There is not in the Cause Petition any distinct allegation that she committed a breach of trust, and that the Appellants knew and participated in committing it. A mere "reason to believe that the trustees were misapplying the assets," would not make the bankers liable: *Keane* v. *Robarts* (5); and in the absence of a clear and positive ground for refusal, it is the duty of a banker to honour the cheques of those who have deposited money in his hands: *Marzetti* v. *Williams* (6).

Mr. *Purcell*, Q.C., and Mr. *Daniel* (both of the Irish bar), for the Respondent:—

The first question here really is, whether the sum of £853 17*s.* 5*d.*,

(1) 1 My. & K. 126, 337.
(2) 2 Coll. C. C. 241.
(3) 21 L. J. (Ch.) 864; affirmed 2 De G. M. & G. 903.
(4) 4 Madd. 332.
(5) Ibid. 356.
(6) 1 B. & Ad. 415. See *Brandao* v. *Barnett*, 12 Cl. & F. 787.

acknowledged by the Appellants to be due to the estate of *T. Johnston*, did not constitute part of the assets of that estate; and the next, if it did, whether that sum has not been misapplied. The first question must be answered in the affirmative upon the evidence, and being so answered, it is difficult to see how it can be contended that the money, being used in the business of the new firm, was not misapplied. It is impossible to deny that the Appellants had full knowledge of all the circumstances affecting these funds. They had had the will in their possession, they had the probate delivered to them, and on that probate they obtained payment of the sums secured by the policies. With full knowledge they received a sum of money which their own accounts shewed to belong to the testator's estate, they put it in their books as a credit for the new firm, and they paid it out on account and for the benefit of the new firm. Those circumstances constitute beyond all doubt a *devastavit*. Trustees have no right to carry on a trade with the funds of the testator. In *Kirkman* v. *Booth* (1) Lord *Langdale* distinctly laid down the rule, that to authorize executors to carry on, or to permit to be carried on, a trade with the property of a testator which they hold in trust, there ought to be the most distinct and positive authority and direction given by the will for that purpose. That proposition is distinctly adopted in *Williams* on Executors (2). There was nothing of the sort here. The origin of the transaction therefore, was unlawful, and the Appellants had to make out the circumstances under which they could exempt themselves from liability. The Appellants had full knowledge that the trust affected the property of the deceased. They had themselves brought a case into the Landed Estates Court, the decision on which left no doubt upon the matter (3).

(1) 11 Beav. 273, 278.

(2) Page 1625, n.

(3) *In re Johnston*, on the Petition of *R. & J. T. Gray* (9 Ir. Ch. Rep. (N.S.) 260), the Plaintiff *Gray* petitioned for a sale of the testator's premises in *Upper Sackville Street*, which Mrs. *Johnston* had charged in favour of the Petitioners to secure advances made by them. It is stated in the report that "it appeared upon the face of the instruments referred to as creating the incumbrances, that the purpose to which the advances were to be applied was expressly set forth in them." That purpose was the aid to the new firm of *Johnston & Mayston*. Judge *Hargreave* said that the "widow having transgressed her duty in this respect, though with the best intentions, it may be, of benefiting her children, she is guilty of an act of waste." Then, referring to

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The widow had done just what Judge *Hargreave* had there declared it was not competent for her to do, and with full knowledge of all these matters the Appellants had assisted in applying the trust funds to the business of the new firm.

The facts of this case shew a knowledge of, and a participation in, an unauthorized course of dealing, such as to take the case out of the ordinary rule of banker and customer, and to make the cases cited with reference to that rule quite inapplicable here. They are almost identical with those of *Pannell* v. *Hurley* (1), where the Vice-Chancellor said: "It is not suggested that *Davy* had any right to the money itself—the bankers owed the money to the trust fund; do they cease to owe it in consequence of what *Davy* has done with their concurrence." What Mrs. *Johnston* has done here could give no right to the bankers, nor could it alter their liability, for they were well aware of the true character of the fund. The Appellants' own allegation in their answering affidavit, that they "always believed, and that Mrs. *Johnston's* solicitor so stated, that she had full power and control over the testator's estate," shewed that the matter had been the subject of consideration, and that they had not acted in ignorance. The onus, therefore, is on them to shew that the sum of £853 17*s.* 5*d.* was applied to satisfy the debts of the testator, and was not applied in breach of the trusts of the will. They knew enough to raise the obligation to inquire into the application of the money. [LORD WESTBURY:—Where is the allegation that the money was, with their knowledge, used in trade in breach of the trust.] The facts here were as strong as those in *Walker* v. *Taylor* (2), where bankers were, on those facts, held liable, so that though there may be no distinct allegation of that sort, no doubt can exist that it was so used. The money did not in fact come to the Appellants in their character of bankers;

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the instruments, and to the affidavit in reply filed by the Petitioners, he expressed his opinion that "they were perfectly aware of the objects for which the money was being raised;" and so he dismissed the Petition, "without prejudice, however, to any proceeding which the Petitioners may be advised to institute on the ground of the Respondent being also a devisee, or by reason of any dealings between her and the other persons entitled under the will."

(1) 2 Coll. 241—244.

(2) 8 Jur. (N.S.) 681.

they were equitable mortgagees of the policies, and in that character received the sums secured. Having settled their own claims, they were bound to hold the residue for the benefit of the persons entitled under the will. They knew that the executrix had entered into a partnership with her husband's late partner, her own son-in-law, that there was a new account with themselves opened by the new firm, and they knew enough of the affairs of the deceased to know that the money to carry on the business of the new firm must have been furnished from his assets, and that that was particularly so with respect to this sum of £853 17*s.* 5*d.*; and the special benefit they received was, that the payment of that sum went in diminution of the liabilities of the new firm to themselves. In every way, therefore, they must be taken to have been cognisant that there was a breach of trust, and they voluntarily participated in giving effect to it.

Mr. *Lawson* was not called on to reply.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the facts of this case, important as it is to the banking community, are, when they come to be considered, extremely short. Mr. *Johnston* was a silk merchant in *Dublin*, where he had traded for a number of years, first alone and afterwards in partnership with Mr. *Mayston*. Even during the time that he traded in partnership with this gentleman it appears that his banking account with the firm of the Appellants, who are bankers in *Dublin*, was kept in his own name, and not in the name of *Johnston & Mayston*. That account was, from time to time, allowed by the bankers to be overdrawn on the security of certain policies of insurance on the life of Mr. *Johnston*, amounting, I think, to £4000. He died on the 29th of June, 1859. He was indebted, along with his partner, to his bankers, Messrs. *Gray*, at the time of his death He made a very short will, by which he appointed his widow his executrix, and gave her the whole of his residuary property for her life, with a power of appointment in favour of his children and grandchildren.

Immediately after the testator's death his widow entered into partnership with Mr. *Mayston*, and carried on the trade of the

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testator under that new firm from the time of his death, banking also with the same bankers, the present Appellants, but a new account being opened in the name of the firm of *Johnston & Mayston*. The bankers desired to be paid, by means of the policies, the amount which was due to them from the testator. They therefore applied to the widow for the probate of his will, and they received the probate from her, and held the probate for some time in their possession. On that occasion they gave an undertaking to the widow, dated the 9th of September, 1859, by which they admitted that they had received the probate, in order to enable them to recover the amount due to them on the policies, and that they had received from her receipts for the policy money for the same purpose, and the letter they sent ended with these words, "I undertake to pay over to you the balance of the said insurance money," that is to say, the balance after paying the amount "due to me at the foot of my account with" the testator.

My Lords, having given that undertaking, the policy moneys were received; the bankers were paid, and there remained in their hands a clear sum of £853, which was credited by them, on the 21st of October, 1859, to the old account in their books which had been kept between them and the testator. On the 1st of November there was drawn, and on the 9th of November there was presented to the bank, a cheque for this sum of £853, signed by Mrs. *Johnston*, as executrix of her husband. The cheque was made payable to Messrs. *Johnston & Mayston*, that is to say, to the new firm, constituted in the way I have described. That cheque was presented to the bank of Messrs. *Gray;* and if it had not happened that Messrs. *Johnston & Mayston* banked with Messrs. *Gray*, it would have been presented over the counter, and the money in return for the cheque would have been paid over the counter to the agent of Messrs. *Johnston & Mayston* who presented it. But inasmuch as they banked with the firm of Messrs. *Gray* themselves, the cheque, instead of being cashed across the counter, was carried to the credit of Messrs. *Johnston & Mayston*. I think your Lordships will be of opinion that that circumstance can make no substantial difference in the case, and that the main question which your Lordships have to consider is this:—What, on the occasion of the presenting of that cheque, was the duty of the

Messrs. *Gray?* Were they at liberty to say that they would refuse to honour it, and refuse to make the payment which they had undertaken, by the letter I have read, to make? Or were they bound to honour the cheque, either by payment in money, or by carrying it to the account of those who were the holders of it?

Now, my Lords, it is here that this case becomes one of extreme importance both to bankers and to the whole community. On the one hand, it would be a most serious matter if bankers were to be allowed, on light and trifling grounds—on grounds of mere suspicion or curiosity—to refuse to honour a cheque drawn by their customer, even although that customer might happen to be an administrator or an executor. On the other hand, it would be equally of serious moment if bankers were to be allowed to shelter themselves under that title, and to say that they were at liberty to become parties or privies to a breach of trust committed with regard to trust property, and, looking to their position as bankers merely, to insist that they were entitled to pay away money which constituted a part of trust property at a time when they knew it was going to be misapplied, and for the purpose of its being so misapplied. I think, fortunately, your Lordships will find that the law on that point is clearly laid down, and may be derived without any hesitation from the authorities which have been cited in the argument at your Lordships' bar, and I apprehend that you will agree with me when I say that the result of those authorities is clearly this: in order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust, intended by the executor, and there must in the second place, as was said by Sir *John Leach*, in the well known case of *Keane* v. *Robarts* (1), be proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that I think I may safely add, that if it be shewn that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed.

(1) 4 Madd. 357.

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Applying these principles to this case, how does it stand? With regard to the first matter to which I have referred, the misapplication intended in this case by the executrix, I must take leave to say that the proof appears to me to fall very far short of shewing that, even as regards the executrix, any misapplication of the fund was intended. In order to establish that we should require to know what the whole of the dealings between the executrix and the new firm had been; because it might well be, for anything which appears in these papers, that the executrix had received, immediately before she gave this cheque, the full amount of it, and had applied that full amount, in some way or other, for the benefit of the estate. But, passing by that, let me come to the second question. Were the bankers in this case privy (to use the words of Sir *John Leach*) to any intention of misapplication of these funds? What is the evidence of any such privity? Your Lordships asked the learned counsel who argued the case for the Respondent, what the evidence was on which they could lay their hands; and, as I understood them, the only suggestion they could make was this—they said that, inasmuch as the widow had entered into partnership, after the death of her husband, with Mr. *Mayston*, she must be taken to have used the estate of her husband in that partnership, and using the estate of her husband in that partnership would be a breach of trust, and that then the bankers must be taken to have known that she had, as regards the past, committed that breach of trust, and therefore it must be assumed that they must have known that she intended, by making this cheque payable in the way in which it was made payable, to continue that breach of trust.

Now, I must say that that appears to me to be a structure of propositions, as to which, in the first place, there is no kind of allegation in this Petition which warrants them. There is no allegation in this Petition that the executrix employed the assets of the testator in the trade. There is no allegation in the Petition that the entering into the trade on her part was a breach of trust. And farther than that, I take leave to doubt very much whether the mere fact that some breach of trust, as regards this trade, had in time past been committed by their customer would, alone, have entitled the bankers, or justified them, in refusing to honour the

cheque of their customer, unless it could be shewn that they knew, as regards that particular cheque, that it also was to go in the same line of misapplication.

As regards the third ingredient existing in some of these cases to which I have referred, namely, personal benefit to the bankers designed or stipulated for, it was suggested here that inasmuch as the account of the new firm of *Johnston & Mayston*, if balanced on the particular day on which the cheque was credited to them, would have been found to have been overdrawn, the bankers derived a benefit in this, that the cheque was placed to the account of *Johnston & Mayston*, and so diminished or wiped out the balance that would otherwise have existed against them. But when the matter comes to be looked at it appears to stand thus—no complaint was made by the bankers of Messrs. *Johnston & Mayston* having overdrawn their account, and no payment was asked by the bankers from them. In no way were the bankers benefited by this transaction except this, that, apparently as a mere matter of ordinary business routine, the cheque was carried to *Johnston & Mayston's* account, and inasmuch as on that particular day they were debtors on their account, the balance was diminished in favour of the bankers by the payment of the cheque. But I carefully use, and I think your Lordships will hold that it is proper to use, the words "benefit designed or stipulated for," because, with regard to a benefit arising in the way in which it arose in this case, it appears to me wholly impossible to imagine that the bankers can have been influenced, in any degree, in their conduct by the indirect and incidental benefit which they thus derived.

I am, therefore, my Lords, compelled, with great respect for the Lord Chancellor of *Ireland*, to submit to your Lordships that it would be eminently unsafe to hold, upon an allegation and proof of the kind now brought before your Lordships, that the Petitioner in this case is entitled to relief. It appears to me that in the case which he alleged he entirely failed; and that the proper order upon this Petition would have been to dismiss the Petition with costs, and I now humbly advise your Lordships to substitute an order to that effect in lieu of the order which was made by the Lord Chancellor of *Ireland*.

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LORD WESTBURY:—

My Lords, the questions arising in this case are of very great importance to the community at large; and I should be sorry that any doubt should exist with regard to the principles by which they ought to be decided. Nothing can be better settled than that if an executor commits any dishonesty by misappropriating part of the assets of a trust estate for the benefit of *A.*, to whom he is indebted, *A.* knowing it and receiving the money, may be required, in equity, to make restitution of that money for the benefit of the estate. So, in like manner, if a trustee, for his own private purposes, aliens or hands over a portion of the trust estate by a breach of trust, the party knowingly receiving the property stands in the shoes of the trustee, and is equally liable to make restitution.

The relation between banker and customer is somewhat peculiar, and it is most important that the rules which regulate it should be well known and carefully observed. A banker is bound to honour an order of his customer with respect to the money belonging to that customer which is in the hands of the banker; and it is impossible for the banker to set up a *jus tertii* against the order of the customer, or to refuse to honour his draft, on any other ground than some sufficient one resulting from an act of the customer himself. Supposing, therefore, that the banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a cheque for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the cheque, for if he did so he would be making himself a party to an inquiry as between his customer and third persons. He would be setting up a supposed *jus tertii* as a reason why he should not perform his own distinct obligation to his customer. But then it has been very well settled that if an executor or a trustee who is indebted to a banker, or to another person, having the legal custody of the assets of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving the debt has at once not only abundant proof of the breach of trust, but participates in it for his own personal benefit.

These things being perfectly well settled by authority, and, what is more, being perfectly well founded in the reason of mankind, the question in the present case resolves itself simply into this:—Was the payment of the £853, under the cheque of Mrs. *Johnston*, made by the bankers to the credit of the new account, a payment for the benefit of the bankers directly, and in consequence of an agreement between them and Mrs. *Johnston?* That is the only point which admits of any kind of argument or inquiry. Now it is material to observe that the payment was made upon a cheque drawn by Mrs. *Johnston* without any agreement, or concert, or collusion with the bankers at all. It depended on Mrs. *Johnston* whether she should direct the proceeds of that cheque to be handed over to the new account or not. It was not done at the instance, or by the desire, of the bankers at all. In obeying the order of his customer, the banker did not look at all to his own personal benefit. He transferred the sum of money to the credit of the account kept with him by the new firm. No balance was struck upon that account; no special application was made of the money; the account continued to be a current account in the ordinary way.

The question, therefore, resolves itself into one of fact. Can the payment of that money to the credit of the account of the new firm be properly treated as a payment for the benefit of the bankers, designed and intended to be the means of payment to the bankers of the debt that might be due to them on the new account? My Lords, it would be impossible to say that any such thing was either designed or intended; and it would be equally impossible to say that any such thing was at once accomplished by means of the payment of the money to the credit of the new account. If it had been so accomplished; if a balance had been immediately struck, and the sum of money so paid in had been appropriated at once to the payment of the balance due on that account to the bankers, or if any other transaction had been made by which you might follow the money and say that it was applied according to the agreement of the parties directly and expressly in discharge of a debt due from the new firm to the bankers, then we should want no more to compel restitution from the bankers, and the case would fall within the ambit of well-settled

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and firmly-fixed authorities. But it is impossible, I think, to credit the statement that this was a payment intended to be for the benefit of the bankers, or that it was made by any collusion or fraudulent agreement between the bankers and the executrix in order that the bankers might derive a personal benefit therefrom. That being so, it was a payment in the ordinary way of trade in common discharge of the ordinary duty between a banker and his customer, and it is impossible for the parties interested in the estate to follow that transaction to stamp it with the character of fraud, and to make out that the payment was any other than what it appears to have been, namely, a payment in the ordinary course of trade, and to pursue it as having a different character, the character, namely, of a payment made collusively and fraudulently by the executrix for the personal benefit of the bankers.

That being so, my Lords, I think the case undoubtedly was not well apprehended in the Court below, and I entirely concur with my noble and learned friend the Lord Chancellor in thinking that it is right that the judgment should be reversed, and that the Petition should be dismissed with costs.

LORD COLONSAY:—

My Lords, I have nothing to add to what has been stated by my noble and learned friends. I entirely agree in the principles which have been laid down.

Decretal Order reversed, Petition in Court below dismissed with costs, and cause remitted.

Lords' Journals, 10th March, 1868.

Solicitors for the Appellants: *Bell, Brodrick & Lambert.*
Solicitors for the Respondents: *P. Burrowes Sharkey.*

HENRY LORD BISHOP OF EXETER AND J. H. COATES BORWELL, CLERK . . . . } PLAINTIFFS IN ERROR;

AND

PETER CHARLES MARSHALL, CLERK . . } DEFENDANT IN ERROR.

1866
June 26, 27.

1867
Feb. 21, 22;
July 1, 2, 3, 4;
Aug. 5.

1868
March 3.

Clergy—Patron—Presentee—Canons of 1603.

The Canons of 1603 have not been allowed and received so as to form part of the law of *England*, and bind the laity as well as clergy (*Middleton* v. *Crofts* (1) confirmed). But even if binding on the clergy,—then,

The 39th Canon of 1603 applies only to the institution of a presentee to a benefice.

The 48th Canon of 1603 does not apply to a presentee to a benefice, but does apply to a person seeking to be admitted as curate to an existing incumbent.

The right of a patron to present to a benefice is a legal right, subject in its exercise to the bishop's right to examine into the fitness of the presentee, and to reject him for sufficient ground.

A clerk who has held preferment in one bishopric is not, on being presented to a living in another bishopric, bound, as a condition precedent to his examination on the question of fitness, to produce letters testimonial and commendatory from his former bishop.

In *quare impedit*, upon a rejection of the patron's presentee, the bishop's plea must state not only that the presentee is not a fit person, but also in what respect he is not fit, and state it in such a manner as will enable the patron to take issue on the objection, and a proper tribunal to judge of its soundness.

An allegation in the plea that the bishop had good reason to believe that the presentee had been guilty of an attempt to commit simony is not sufficient:—

Semble, that a plea alleging presentation by the bishop as on a lapse must allege notice to the patron of the circumstances under which the bishop would so claim to present.

THIS was an appeal against a decision of the Court of Exchequer Chamber, which had confirmed a previous judgment of the Court of Common Pleas.

Mr. *Marshall* was the patron of the rectory of *Tregony*, in *Cornwall*, in the diocese of *Exeter*. He was also a clergyman, and had himself been the incumbent of that rectory, but resigned it on the 3rd of August, 1857, and on the 9th of January, 1858, presented thereto *John Reid*, Clerk, a clergyman who had pre-

(1) 2 Atk. 650; 2 Str. 1056.

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viously held a living in the diocese of *Manchester*. On the 16th of January, Mr. *Reid* personally applied to the Bishop of *Exeter* for admission and institution to the rectory of *Tregony*, and then produced to the Bishop the following paper:—"To the Right Rev. *Henry* Lord Bishop of *Exeter*. We whose names are hereunder written testify and make known that the Rev. *John Reid*, M.A., Clerk, formerly of *St. John's College, Cambridge*, and late of the rectory of *Claughton*, in the county of *Lancaster*, presented to the rectory of *Tregony*, with the vicarage of *Cuby* annexed, in the county of *Cornwall*, in your Lordship's diocese, hath been personally known to us for the space of three years last past, that we have had opportunities of observing his conduct, that during the whole of that time we verily believe that he lived piously, soberly, and honestly, nor have we heard anything to the contrary thereof, nor hath he at any time, so far as we know or believe, held, written, or taught anything contrary to the doctrine or discipline of the United Church of *England* and *Ireland*. And, moreover, we believe him in our consciences to be, as to his moral conduct, a person worthy to be admitted to the said benefice. In witness, &c.

W. B. Grenside, M.A., Vicar of *Melling*, county of *Lancaster*.
J. M. Wright, Rector of *Tatham*, in the county of *Lancaster*.
Richard John Shields, Incumbent of *Hornby*, in the county of *Lancaster*."

This paper was accompanied by the following certificate from the Bishop of *Manchester*:—"The subscribers are beneficed in the diocese of *Manchester*. Mr. *Reid* was long non-resident on his benefice, but I know no reason why he should be legally hindered from being allowed to take other duty.

J. P. Manchester."

The Bishop of *Exeter* informed Mr. *Reid* at that time that he (the bishop) required other and farther testimony from the Bishop of *Manchester*, according to the ecclesiastical laws, of Mr. *Reid's* honest conversation, and ability, and his conformity to these laws.

A correspondence ensued between the Bishops of *Exeter* and *Manchester* and the brother-in-law of Mr. *Reid*. No other testimony was ever presented to the Bishop of *Exeter*, and on the 1st of March, 1858, the living having been vacant upwards of six months, the Bishop of *Exeter* collated, as upon a lapse, the Rev.

Mr. *Borwell* to the living. It did not appear that any notice of his intention to do so had been given to Mr. *Marshall*, the patron.

In December, 1858, Mr. *Marshall* brought *Quare Impedit* against the Bishop of *Exeter* and Mr. *Borwell*. The Defendants joined in pleading. Mr. *Borwell* pleaded that he was parson impersonate of the said church by the collation of the bishop. The bishop pleaded that he did not claim anything in the said church except as Ordinary. The pleadings then alleged that *Reid* brought testimony from the bishop of the diocese of *Manchester*, "which he, the Bishop of *Exeter*, held not to be, and which was not, sufficient testimony, according to the ecclesiastical laws of *England*, of the said *John Reid's* honest conversation, ability, and conformity to the ecclesiastical laws of *England*, or such testimony as he (the Bishop of *Exeter*) was bound and ought, by the laws ecclesiastical of *England*, to require, and have, and receive from the bishop of the said diocese whence the said *John Reid* had come, and in which he had so as aforesaid lately held a benefice and cure as aforesaid" (1); that the Bishop

(1) The ancient law of the church specially relied on by the bishop, was alleged to be in the Canons of 1603. The 39th of these Canons is headed "Cautions for Institution of Ministers into a Benefice;" and is in these words: "No bishop shall institute any to a benefice who hath been ordained by any other bishop, except he first have sent him his letters of orders, and bring him a sufficient testimony of his former good life and behaviour, if the bishop shall require it, and lastly, shall appear upon due examination to be worthy of the ministry."

The 48th Canon entitled "None to be curates but allowed by the bishop," was in these words: "No curate or minister shall be permitted to serve in any place without examination and admission of the bishop of the diocese or ordinary of the place having episcopal jurisdiction, in writing under his hand and seal, having respect to the greatness of the cure and meetness of the party; and the said curates and ministers, if they remove from one diocese into another, shall not be by any means admitted to serve without testimony of the bishop of the diocese or ordinary of the place as aforesaid whence they came, in writing, of their honesty, ability, and conformity to the ecclesiastical laws of the Church of *England*. Nor shall any serve more than one church or chapel upon one day, except that chapel be a member of the parish church, or united thereto, and unless the said church of chapel where such a minister shall serve in two places be not able, in the judgment of the bishop or ordinary as aforesaid, to maintain a curate."

The Canons in question are thus given in *Cardwell's* Synodalia, pp. 187, 192.

"39. *Nullus episcopus ministrum quemvis ab alio episcopo ordinatum, in beneficium aliquod de caetero instituet, nisi qui literas ordinationis suae eidem ostenderit, et de morum honestate, vitaque probabili congruum testimonium, episcopo id postulante, exhibuerit; ac nisi debite examinatus, ministerio suo dignus inventus fuerit.*"

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of *Exeter* required farther and sufficient testimony from the Bishop of *Manchester*, but that it was never brought; but, in fact, the Bishop of *Exeter* "before such collation as hereinafter mentioned had received from the Bishop of *Manchester*, and otherwise, farther testimony from which he (the Bishop of *Exeter*) was induced to believe, and did believe, and had good and sufficient reason for believing, that the said *John Reid*, whilst a beneficed clergyman, had attempted to commit simony, and that he was not a fit person and proper to be admitted, and by reason of the premises, &c.," a lapse having occurred, he (the Bishop) collated Mr. *Borwell*, &c.

The replication took issue on the pleas, and farther denied the allegation of an attempt to commit simony, and then set out the testimony of the three clergymen and the certificate of the bishop, and alleged that the Bishop of *Exeter* required from the said *John Reid* a farther testimony, but that he never gave notice to *Reid* or to the Plaintiff (*Marshall*) that he required such farther testimony to be brought to him within any fixed or specified time, or that he would not receive the same after the lapse of six months from the avoidance of the living, or that he had finally determined not to wait longer, and to persist in his objections to the first testimony as insufficient; that negotiations continued between the Bishop of *Exeter* and *John Reid* for farther testimony, and that neither *Reid* nor the Plaintiff ever had any notice from the said bishop, nor ever, in fact, knew, before the collation of Mr. *Borwell*,

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"48. *Nulli curato aut ministro permittetur ullibi curae animarum inservire, nisi prius per episcopum diœcesanum, vel loci ordinarium episcopali jurisdictione prædictum examinatus ac admissus fuerit, ejusque rei testimonium manu episcopi et sigillo consignatum obtinuerit: habito semper respectu tum ad curae ipsius magnitudinem tum ad personae admittendae habilitatem. Quinetiam dicti curati et ministri siquando ex una diœcesi in alteram transierint, nequaquam ad curam ullam exercendam admittentur, nisi episcopi, ejus diœceseos unde advenerint, vel loci ordinarii (ut supra) literis testimonialibus de ipsorum honesta conversatione, sufficientia, et conformitate ad ecclesiasticas regni Anglicani leges muniti accesserint. Nec vero eorum cuilibet licitum erit, pluribus quam uni ecclesiae aut capellae uno eodemque die ministrare, nisi forsan capella illa ecclesiae parochialis membrum existat, aut eidem unita, vel nisi ecclesia aut capella, cui taliter inserviet, judicio episcopi vel ordinarii (ut supra), curato alendo non sufficerit.*"

that the said bishop would or did claim to collate any clerk to the said church; and, except as aforesaid, the said bishop never, at any time before the said collation of Mr. *Borwell* refused to admit, institute, and induct Mr. *Reid* as the Plaintiff's clerk.

The Plaintiff also demurred generally to the plea. The ground of demurrer was, that the facts set forth did not shew any lapse entitling the bishop to collate. The Defendants took issue on the first, and joined issue on the second replication, and they joined in the demurrer to the plea, and they also demurred to the replication. The ground of demurrer was, that the replication did not shew that lapse had not duly occurred.

The Court on the argument on the demurrer held the plea to be bad, and the replication to be good (1), and ordered that a writ to admit should issue, but execution of this judgment was stayed till after trial and the assessment of damages. The cause was tried at the Spring Assizes for *Cornwall* in 1860, before Mr. Baron *Channel*, when a special verdict was found, which set forth in substance that the Bishop of *Exeter* did not assign any other reason for not admitting the said *John Reid* than the alleged insufficiency of the paper, that a sufficient time had elapsed to enable *Reid* to obtain such farther sufficient testimony if he was bound and required by law to obtain the same. It then set out the whole of the correspondence between the parties, and found that the Bishop of *Exeter* did not give notice to *Reid* or the Plaintiff that he required farther testimony to be produced within any fixed or specified time, and would not receive the same after six months from the avoidance of the living, nor give any notice relative to the said matters, and that they did not know that he would persist in requiring such farther testimony and would collate if it was not furnished. And the verdict found the Church to be of the value of £390 a year.

Judgment was given for the Plaintiff in November, 1860, and this judgment was affirmed on Error. The case was then brought on Error up to this House (2).

(1) 7 C. B. (N.S.) 653.

(2) The case was first argued in June, 1866, by the Attorney-General Sir *R. Palmer* (Sir *F. Kelly*, and Mr. *Philpott*, were then with him.) Shortly afterwards Sir *F. Kelly* was appointed Lord Chief Baron of the Court of Exchequer. The argument for the Plaintiffs in Error was renewed in February, 1867, by Mr. *Philpott*.

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The Judges were summoned, and on the first hearing Lord Chief Baron *Pollock*, Mr. Justice *Willes*, Mr. Justice *Blackburn*, Mr. Justice *Mellor*, Mr. Baron *Pigott*, and Mr. Justice *Smith* attended. On the subsequent hearings, Sir *Frederick Pollock* having resigned his office of Lord Chief Baron, did not attend, nor did his successor, Sir *Fitzroy Kelly*, he having been previously one of the counsel for the Bishop of *Exeter*. The learned Judges who attended the House were Mr. Baron *Martin*, Mr. Justice *Willes*, Mr. Justice *Blackburn*, Mr. Baron *Pigott*, and Mr. Justice *Lush*.

The *Attorney-General* (Sir *Roundell Palmer*), and Mr. *Philpott*, for the Appellant.

It may be admitted that the canons of the Church are not, in the strict sense of the phrase, binding upon the laity, but they are binding upon the clergy. But this rule, to be deduced from the case of *Middleton* v. *Crofts* (1), is subject to this qualification, that, so far as the canons are parts of the ancient law of the church, that ancient law does bind the laity. In this way the Canons now in question, being, in fact, declaratory of the old law of the church, as Lord *Hardwicke* in *Middleton* v. *Crofts* plainly supposed they might be, are binding on the laity.

The form of ordaining priests shews that examination of fitness was a necessary and strictly enforced preliminary to institution to a benefice. The bishop, after imposition of hands, uses the words, "Be thou a faithful dispenser of the Word of God;" and to no one, in whatever rank, can be entrusted the cure of souls unless the bishop is satisfied of his fitness to do the sacred work (2). This was fully discussed in *The Bishop of Down* v. *Miller* (3), where it was held that a bishop of one diocese might forbid a clergyman to preach in his diocese though duly licensed to another, and having the permission of the incumbent of the church where he proposed to preach.

Wherever there was cure of souls the bishop had a right to be satisfied of the fitness of the person presented, and if he came from a different diocese, the bishop had a right to require him

(1) 2 Atk. 650; 2 Str. 1056.

(2) Keble, Liturgia; Bp. Bur. Sermons, Oxf. Ed. 1862; Archbp. Potter's Tracts on Church Government (Ed. 1750) p. 452; Hodgs. Forms.

(3) 13 Ir. Jur. 197.

to bring letters testimonial, and from the other bishop letters commendatory. In the case of institution, where cure of souls was necessarily connected with it, the bishop into whose diocese the presentee came, was bound as well as entitled to require letters testimonial, and commendatory.

It had been thought in the Court below that the 48th Canon, which mentioned these letters, was applicable only to stipendiary curates, but that was an error. The word "*curatus*" applied to any person invested with the cure of souls: *Lyndwoode* (1). In that way it was applicable to a bishop himself: *Van Espen* (2). And the statute 2 Hen. 4, c. 15, speaks of "curates in their own churches," which shews that the word was then understood to include properly beneficed ministers, although, no doubt, the word might likewise be applied, as it is now, to ministers who were not beneficed.

The ancient law, as stated by *Lyndwoode*, is explicit as to the necessity for these letters commendatory. He says, *Tit de Clericis Perigrinis* (3): "*Nullus alterius diocesis capellanus ad celebrationem admittatur sine diocesani sui literis, aut alterius episcopi, dummodo de ejus fide et moribus bona sit commendatio.*" And in a previous page (4), he defined "*capellanus*" to mean "*sacerdos*," and commendatitial letters to mean letters which bore commendation or testimony of the honest life and good morals of the person to be ordained. In like manner he explains, "*Sui diocesani*" of the "*alterius capellanus*" thus: "*In cujus diocesi natus est, vel in cujus diocesi domicilium habet.*" There are many other passages to the same effect (5). And so there are in other collections of authorities, and by other writers on ecclesiastical law: *Peter de Murga* (6); *Barbosa* (7); *Beveridge* (8). The Council of *Chalcedon*, which declared the same rule, was one of the four general councils whose canons are recognised in the 1 Eliz. c. 1, s. 36. The same rule is to be found in the *Corpus Juris Canonici* (9), and the

(1) Provinciale, Ed. 1679, p. 238.
(2) Vol. i. p. 132.
(3) Prov. p. 48.
(4) Ibid. p. 47.
(5) Pages 135, 139.
(6) Tract de Benef. pp. 115, 275, 278.
(7) De Off. et Potestate Episcopi (Ed. 1698) p. 259.
(8) Canones Cons. Chalced. xiii. p. 129; and Pandectre Canonum, 176; and Cod. Can. Ecc. 443.
(9) Chap. 6, 7, 8, 9.

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Decretals, as collected by *Raymundus* (1), express it in clear and plain terms. The statute 13 Edw. 1, c. 5, adopted in substance the declaration of the early councils as to the admission, after examination by the bishop, of a fit person to be instituted, and made the admission and institution conclusive against the patron for several reasons, the first of which is, as Lord *Coke* says (2), because it is a judicial act of the bishop, and the right to examine is expressly declared to be in him (3). The existence and authority of this law of the Church is affirmed in *Gibson* (4), and the form of statement of the requisites for institution and induction described in the most authoritative books, shews that these letters testimonial were in every instance required. *Bacon's Liber Regis* (5) is distinct upon this point.

(1) Ed. 1744, p. 283. There were also cited *Bede's* Mon. Hist. Brit. (published under the direction of the Master of the Rolls in 1848), p. 216; the decrees of the Council of *Chalcuthense*, Johns. Can. 266; 1 Wilk. Conc. 145; 1 Spel Conc. 292 [This appeared to be a British council, but it was said to be doubtful in what part of *England* it was held. *Hollingshead* and *Spelman*, 1 Conc. 313, speak of the place as in *Mercia*. Sir *Harris Nicolas*, "Chronology of History," p. 226, gives it under the date 787, as a council held at *Celchyth* (or *Cealchythe*) in *Northumberland*.] Canons of the Council of *Hertford*, 1; 1 Spel. Conc. 152; The XVII Can. of the 6th Gen. Council, "*sive in Trullo*;" The Council of *Winchester*, 2 Spel Conc. 12; — of *Exeter*, 2 Spel. 350; The Constitutions of *Islip*, 2 Spel. Conc. 610; The Canons of *Reynolds*, 1322; — of *Arundel*, 1408; in Lynd. Prov. 47; Apostolorum Canones, 2; Bibl. Voelli, vol. ii. p. 787, 1414; 25 H. 8, c. 19; 35 H. 8, c. 16; Rochus de Curte, 37; Dartis Op. Comm. Ed. 1656, pp. 149, 150, 151; Devotus Inst. Can. bk. iv. p. 189-191; Di Murga Tract de Ben, 278; Gibs. Codex, 806; Jus. Can. Univ. bk. 1, tit. xxii, p. 211.

(2) 2 Inst. 357.

(3) 2 Inst. 631, 632.

(4) Codex, 806.

(5) Append. p. 1281. For institution, the presentation, the orders of deacon and priest must be shewn according to the 39th Canon; then "testimonials of his former good life and behaviour according to the 39th Canon, and if he come out of another diocese, then a testimonial from the bishop or ordinary of the place from which he comes."

These are under "Directions concerning the proper instruments to be brought to the bishop for obtaining orders, institutions, and licences."

But see also the next page, "For a licence to a curacy," the person coming to be licensed is to shew the bishop the nomination by the incumbent; the letters of orders; letters testimonial from his college, or from the neighbouring clergy where he dwelt, and

"In case he comes from another diocese then to bring letters testimonial from the bishop or ordinary of the diocese or place from whence he comes, according to the 48th Canon, and the 8th Article of the archbishop's directions."

In *Brookes's* Abridgment (1) it is said that the Judges of the common law will take notice of what is the law of the Church, and that it need not be specially pleaded, for which are cited the Year Book, 9 Edw. 3, and other authorities. *Specot's Case* (2) does not in the least degree affect this right and duty of the bishop. The decision there was adverse to the bishop, but it was not on the ground that he had no right to examine, and to reject on examination, but that in that instance he had pleaded that the man was an "inveterate schismatic," which was held not to be intelligible. That decision was, therefore, nothing but a decision on a form of words in a plea to a *quare impedit;* and it has been questioned, in *The Bishop of Exeter* v. *Hele* (3), where a plea of *minus sufficiens in literaturâ*, without stating in what particular, was held good; and in *Rex* v. *The Archbishop of Canterbury* (4) Lord *Ellenborough* made some unfavourable comments upon it. In the present case, the matter is of vital importance to the fitness of the presentee. The matter is one of strictly ecclesiastical cognizance. It does not raise any question as to the right of the patron, but applies essentially to the fitness of the presentee. The bishop had a right to require these letters commendatory, and to send back the presentee that he might procure them; if he did not procure them, the lapse occurred, and the bishop had a right to present. There was no need to allege, in the plea, a refusal to admit, and such an allegation would be contrary to the fact, for both sides agree that there was no refusal at all. The bishop sent away the presentee that he might bring a sufficient testimonial; he brought none at all, and so the lapse occurred. This was good, according to a case in the Year Books, 14 H. 7, H. T., pl. 4, fol. 21; 15 H. 7, E. T., pl. 2, fol. 6, where the bishop commanded the clerk to come again within three days; he did not come for six months, and the bishop collated as upon a lapse; and it was held good, though without notice to the patron. So in *Anonymous* (5), the general right of the bishop upon lapse was recognised. And in the case of a grammar school it was expressly held to be a good return to a mandamus commanding the bishop to grant a licence for a gram-

(1) Quare Imp. 12, p. 168.
(2) 3 Leon. 198; 5 Co. Rep. 57.
(3) Show. P. C. 88.
(4) 15 East, 117.
(5) Dyer, 277 (56).

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mar school, that he had suspended the granting of the licence until the party would submit himself to be examined "touching his sufficiency in learning:" *Rex* v. *The Archbishop of York* (1). This shews that time itself may operate to create a lapse, and that no direct and positive act on the part of the bishop, such as an actual refusal to admit, is required for that purpose. The necessity and propriety of obeying the Canons of 1603 in this respect is strongly asserted by Archbishop *Sancroft* (2). Then are these canons to be applied to all ministers with the cure of souls, or are such persons to be admitted without testimonials.

The word "curate," says *Burn* (3), "is a word of ambiguous signification; sometimes, and most properly, it denoteth the incumbent in general who hath the cure of souls," though, he adds, that it is frequently used to signify a clerk not instituted. The former and proper description would include rectors and vicars, and perpetual curates, who, in the absence of vicars, discharge the duty of the cure of souls for them, and have the same authority, and are therefore called *curati*. In the gloss on *Islip's* Constitutions (4), curate is used in that sense, and *principalis curatus* is spoken of. The duty of residing on his cure is declared, and the whole passage shews that curate and incumbent were constantly treated as but one and the same spiritual person. So, again, *Stillingfleet*, "Duties and Rights of Parochial Clergy" (5), says: "The cure of souls is personally committed to him that doth undertake it. And a regard is had to the qualification of the person for such a trust, by the patron that presents, and the bishop who admits and institutes the person so qualified. The old canons were very strict as to personal residence, so as to fix them in their cures. Our Saxon Canons are clear as to the personal cure; and no presbyter could leave his cure and go to another only for honour or profit. And none could go from one bishop to another without his diocesan's leave. And when a bishop gives institution, he commits the cure of souls to the incumbent." A perpetual curate is a curate, yet he is also an incumbent: *Mason* v. *Lambert* (6),

(1) 6 T. R. 490.

(2) D'Oyly's Life of Sancroft, Vol i. p. 182; see also Cardwell's Documentary Annals, p. 342.

(3) Tit. "Curates."

(4) Lyndw. 238.

(5) Pages 220, 221.

(6) Cripps' Laws of the Church and Clergy, p. 167.

and he must satisfy the bishop on all these matters before he can claim to be admitted.

The jurisdiction of the spiritual Court in spiritual things was expressly admitted in *Cory* v. *Pepper* (1), where the force of the canons of the church was recognised, and it was only said that the spiritual Court must not proceed as upon the common law for a penalty, but might proceed on the law ecclesiastical. And if such is the law, and the bishop has the right and the duty to examine the presentee, he must be held entitled in the discharge of this duty to demand that "*congruum testimonium*" which the canon requires from a clerk who comes into a diocese where he was not ordained, and where he is, in fact, as many of the canons describe him, *ignotus*.

Sir *R. P. Collier*, Q.C., and Mr. *Coleridge*, Q.C. (Mr. *Bowen* was with them), for the Defendant in Error:—

The whole question here depends, in the first instance, on the sufficiency of the plea, and that question has been fully raised on the demurrer.

The rights of the patron are essentially involved in this case, and the presentation to the Bishop of *Exeter* of letters testimonial, or commendatory letters, from the bishop of *Manchester*, was not a condition precedent to the institution of the presentee. Assuming, however, that such testimonials were necessary to be produced, sufficient testimonials were produced, and the mere declaration of the bishop that he did not consider them sufficient was not enough. It should have been distinctly stated in what respect they were insufficient in order that issue might be taken on the matter so as to be determined by a competent tribunal. There was no such statement of insufficiency in the plea, which was defective in that respect. Lastly, even if the testimonials were insufficient there was no allegation of notice to the patron that they were so, and that the bishop meant to insist on their insufficiency and would present as on a lapse. [Mr. *Philpott* stated that the bishop insisted that he was not bound to give notice, as might, by possibility, be required in an ordinary case, for that the patron here was himself a spiritual man and not a mere lay patron.]

(1) 2 Lev. 222.

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Sir *R. P. Collier*, continued:—That made no difference. The right of presentation is a temporal right: *Godolphin* (1): and as to the exercise of it there is no distinction between lay and clerical patrons. The canon law is not binding on any patron unless where it is shewn to have been adopted in this country, so as to become part of the common law: *Middleton* v. *Crofts* (2); *Phillips* v. *Bury* (3). But even by the canon law itself this plea would not afford a sufficient answer to the action. The *Statute of Westminster* 2 did not create the remedy by *quare impedit*, but only regulated its operation: *Coke's* Institutes (4). *Caudrey's Case* (5), and *Articuli Cleri*, with *Coke's* commentary thereon, shew how far the rights of the bishop extended in such a case. *Quare impedit* is a common law action, and the bishop must plead such a plea as will be good at common law. There was a long struggle between the clergy and the laity on the subject of the authority of the Church, which *Selden* refers to (6), and in the 51 Edw. 3 there is a statute passed which is thus stated in *Cotton's* Tower Records (7): "The Commons pray that no order be made at the petition of the clergy without the assent of Parliament;" to which the answer of the King is, "Let this be more specially declared." There is no doubt that a bishop has the right and the duty to examine as to the idoneity of a presentee, but if he takes objections on a ground of ecclesiastical law, he must give notice to the patron, so that they may be tried by the archbishop; if on grounds of a temporal kind, he must state them, and the nature of them, so that they may be traversed, and be tried by a jury. In every case there is an appeal against the decision of the bishop. But among all the grounds of rejection of the presentee to a benefice, there is none founded on the non-production of letters testimonial. Such a person is not bound to produce them. That obligation may lie upon others, but it does not lie upon him. The plea here alleges what, if it could be supported, would amount in substance to this, that if the presentee was idoneous, and if the testimony to his character given by any number of clergymen was

(1) Repert. Can. c. 3, p. 34.
(2) 2 Atk. 650; 2 Str. 1056.
(3) 1 Lord Raym. 5.
(4) 2 Inst. 361.
(5) 5 Co. Rep. "Of the King's Ecc. Law, i.
(6) Preface Hist. Tithes, p. v.
(7) Page 148.

sufficient, still, if he did not bring from the bishop of the diocese whence he came letters commendatory to the bishop of the diocese where he was presented, the latter would have the right to reject him. There is no such law. If it existed, it would enable any bishop of one diocese to prevent a clergyman going into another diocese, and would enable the other bishop, from any motive of caprice, to refuse to receive him, and the patron and the presentee would alike be without a remedy. And the same would be the result if a clergyman had, for any cause however innocent, or even meritorious, been abroad for some years, and then came back to the diocese where he had been formerly ordained, but a new bishop was there who knew him not, and who might, therefore, decline to give him letters commendatory.

Even if the matter here suggested could, which it cannot, form an answer to the action of *quare impedit*, the plea is bad for not so alleging it that it may be traversed. The plea that no sufficient testimony was brought could not be put in issue so as to be tried before any spiritual or temporal Court, and it is therefore bad: *Specot's Case* (1). It is supposed that Lord *Ellenborough*, in *Rex* v. *The Archbishop of Canterbury* (2), threw some doubt on *Specot's Case*, but that is a mistake. On the plea of *minus sufficiens in literaturâ* he shewed that no trial before a jury would be satisfactory, and no doubt such a return must be tried by the archbishop, but he did not in the least degree impugn the doctrine that the bishop must shew a good and a sufficient ground for rejection of a presentee, and that when it was a matter of fact it must be so set forth that it could be traversed and tried. And it was because *minus sufficiens in literaturâ* is a matter which can be tried by the archbishop that it was held sufficient in *Hele* v. *The Bishop of Exeter* (3).

Palmes v. *The Bishop of Peterborough* (4) is decisive as to the question here raised. It was there held that the bishop cannot refuse a clerk for want of letters commendatory. That is the only case in which this one ground of refusal was distinctly decided on, yet the cases affecting causes of refusal are very numerous. They

(1) 5 Co. Rep. 57.
(2) 15 East, 117.
(3) 3 Lev. 313.
(4) 1 Leon. 230.

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are collected in *Viner* (1). In *Palmes'* case the clerk did not shew letters of ordination, nor did he bring letters commendatory. The bishop may have founded his refusal on both objections, but the refusal was held bad, and it is said in general terms that "the bishop cannot refuse a clerk for the want of letters testimonial." That case has never been impeached.

But supposing the Canons of 1603 to have a binding power in this case, then the bishop here has mistaken the canon which is applicable to it. He has proceeded on the 48th Canon, which really only refers to curates, whereas he ought to have proceeded on the 39th Canon, which applies to beneficed ministers. The 39th Canon does not warrant the demand of letters commendatory; and the 48th, which does require such letters, applies to curates only. But then it is said that the word "curates," applies to those who have the cure of souls, without reference to any thing else, and is not restricted to the sense in which it is used at the present day. That argument is not founded in fact. The 13 Eliz. c. 20, s. 2, and the 14 Eliz. c. 11, s. 16, which relate to livings, make a marked distinction between beneficed clergymen and curates, and this distinction is recognised in *Watson's* Clergyman's Law (2); *Burn's* Ecclesiastical Law (3); *Rex* v. *The Archbishop of Canterbury* (4); and *Gates* v. *Chambers* (5).

The requirement to produce "*congruum testimonium*" is not intended to apply to a clerk who was to be instituted to a benefice. It was required only in the case of the non-beneficed clergy, now commonly described by the word "curates." Travelling clergy were not favourites in the Church in early times. At some periods the clergy appear almost to have been *adscripti glebæ*. In *Bingham's Origines* (6) it appears that even a bishop was hardly allowed to travel. [Lord *Westbury*:—What is the Latin word used there for travel?] *Peregrinare*: The wandering clergy were called *vacantivi* (7).

(1) Abr. tit. "Presentation," Z. A. *Refusal.*

(2) Pages 311, 312.

(3) Tit. "Curates."

(4) 15 East, 117, 145.

(5) 2 Add. Ecc. Rep. 177, 192.

(6) 1 *Bingham's* Origines, bk. ii., c. 16, s. 19, p. 215. Bishops were not to travel without the letters of their metropolitan.

(7) 2 *Bingham's* Origines, bk. vi., c. 4, s. 5. "The laws were no less severe against all wandering clergymen, whom some of the ancients call Βακαντίβοι, or *vacantivi*, by way of reproach. They were a sort of idle persons who, having

The canons quoted on the other side apply to clerks moving from place to place, and were directed against wandering clergy, and not against a clerk who went from one see to another in order to be instituted into a particular benefice. The prohibitions to one bishop to ordain a person coming from another's diocese were numerous, but all these prohibitions related to the wandering clergy. All these canons were directed solely against persons who, to translate freely the words used in them, might be described as men who ran about (1). It is clear, upon examining the *Corpus Jures Canonici*, that letters commendatory were not in early times required upon institution to a benefice. The references to *Barbosa*, *Ostiensis*, and the Constitutions of the Council of *Hertford* (2), shew that their provisions are all applicable, not to beneficed clerks, but to the wandering clergy, and to them alone.

The plea is bad for want of alleging notice. *Ayliffe* says (3) that the bishop may not refuse institution on caprice, but for good grounds, and must give notice of the unfitness of the presentee that the patron may present another. *Burn* (4) is to the same effect. It is clear that the law never intended that a bishop should, by his own conduct, make a lapse, which he could easily do if he chose simply to say that the testimony was not sufficient and that he required something more, and then, carrying on the same indefinite objection for six months, could claim at the end of that time to present as upon a lapse. Besides, here the plea does not allege a refusal to institute, so that on the face of the plea itself no lapse could occur.

The plea is bad for stating only that there was reason to believe that *Reid* had attempted to commit simony. It should have

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deserted the service of their own church, would fix in no other, but went roving from place to place as their fancy or their humour led them. Now, by the laws of the church, no bishop was to permit any such to officiate in his diocese, nor indeed, so much as to communicate in his church, and because, having neither letters dimissory, nor letters commendatory, from their own bishop (which every one ought to have that travelled) they were to be suspected either as deserters, or as persons guilty of some misdemeanour, who fled from ecclesiastical censure."

(1) Decretals of Jur. III. bk. 3; Institutione, tit. 7, c. 5; Corp. Jur. Can. Pars. prim. Distinct, 71, 72, 98; Lynd. De Cler. Peregr. 47, 48, 49.

(2) 1 Spel. Conc. 152, A.D. 673.

(3) Parergon, 299.

(4) Tit. Benefice, 157.

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alleged, if it had been true, which it was not, that he had committed simony, and it should have set forth the averment of fact in such a way that it could be traversed and tried. [THE LORD CHANCELLOR:—The first instance of simony was only an attempt.]

The person now known as a perpetual curate holds a particular character, and is not to be likened to a curate. A perpetual curate resembles a beneficed clergyman, and an action may be maintained by his successor against him for dilapidations: *Mason* v. *Lambert* (1); which certainly would not be the case with a curate. The distinction between them is manifest.

Sir *R. Palmer* replied.

THE LORD CHANCELLOR (Lord *Chelmsford*) proposed the following question to the Judges:—

"Whether upon the whole record the judgment ought to be entered for the Plaintiff or the Defendant?"

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Aug. 5.

MR. JUSTICE BLACKBURN:—

My Lords, I have the honour to deliver the joint opinion of my brothers *Pigott*, and *Lush*, and myself.

In answer to your Lordships' question, we say that, in our opinion, the judgment on the whole record ought to be given for the Plaintiff. Our reasons for this opinion are as follows:—

The right of the patron in an advowson is a temporal right of property, the exercise of which, however, necessarily affects the cure of souls. The clergy in early times wished to establish the doctrine, in favour of which, no doubt, a good deal may be urged, viz., that as the cure of souls was of the higher nature, and that, as the temporal right of the patron was but an incident to the institution to the cure of souls, which, according to their view, belonged exclusively to ecclesiastical cognizance, the jurisdiction as to the temporal rights of the patron was necessarily drawn into the spiritual Court. But this doctrine was successfully resisted in *England* by the Crown and the common lawyers; and since the Statute of *Westminster* the 2d, chapter 5, at all events, if not before,

(1) 12 Q. B. 795.

there can be no doubt that the patron has the right to sue in *quare impedit* in the temporal Court to enforce the institution of his presentee and the ouster of any clerk wrongfully instituted; and that the bishop must, if he defends the suit, by plea shew the reason why he did not admit the clerk presented by the patron, and that of the sufficiency of this reason in point of law the temporal court is to judge.

There is no doubt that the law is that the patron can present no one who is not a fit person, and that the bishop is entitled to inquire whether the presentee is a fit person, and, if he is not, is bound to reject him. But in the plea in *quare impedit* it is not enough for the bishop to say that he *thought*, or even found, that the clerk presented was not a fit person; he must state positively that he was not a fit person, and must state in what respect he was not fit, with so much certainty and particularity as will enable the Court to judge whether the objection is one which, if true in fact, renders him unfit, and will enable the patron to take issue upon it if he disputes the truth of the objection.

It is not material in the present case to inquire what degree of certainty or particularity in the plea was requisite; probably since the abolition of special demurrers that question will never again be raised. All that is important for the present case is to point out that the uniform course of pleading, from the earliest times, has been based on this,—that the finding of the bishop *never concludes the patron*, but that, whatever be the objection which the bishop thought fatal, it is examinable and traversable in the temporal Court. This, we think, has never been disputed, and it is not necessary to refer to any farther authority in support of it than the 2nd Institute, p. 631.

Now in the present case the bishop, in the latter part of his plea, alleges that he had *good reason* for believing that the presentee had been guilty of an attempt to commit simony; but he does not say that the presentee *had* made that attempt, or that the bishop could prove it; and, though it might be not unreasonable if the law allowed the bishop to require that the clerk presented to him should be not only untainted with proved guilt, but also free from suspicion so serious as to affect his utility in his cure, yet it is clear that such is not the law of *England;* nor, on the argument

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at your Lordships' bar, was any reliance placed on this part of the plea.

The earlier part of the plea is what was relied upon, and it is material to see what is really alleged in it. It is pleaded that the clerk came from a foreign diocese, that of *Manchester*, and that he did not at any time bring with him a sufficient testimony from the bishop of that diocese of his honest conversation, ability, and conformity to the ecclesiastical laws of *England*, or any such testimony "as he the said bishop was bound and ought by the laws ecclesiastical of *England* to require and have and receive from the bishop of the diocese from whence" the clerk came.

The plea does not say that the clerk was, on examination, found not fit, but that the bishop was not bound to, and did not, examine him at all, because, according to what he asserts is the ecclesiastical law of *England*, it was a condition precedent to his examination that the clerk should produce a testimony from the foreign bishop, and that this condition was never fulfilled. The question therefore is whether, by the ecclesiastical law of *England*, such a condition is imposed. If no such condition precedent is imposed by law the plea is clearly bad.

On the argument, both in the Court below and at your Lordships' bar, several of the Canons of 1603, and several much more ancient canons, were cited, which it was argued bore out this proposition. We do not think it necessary to enter into the inquiry whether these canons really, when fairly construed, bear the meaning put upon them by the counsel for the Appellant, or not; for we are clearly of opinion that if the canons bear that construction they have never been received and allowed so as to be part of the ecclesiastical law of *England*.

The very able and elaborate judgment of Lord *Hardwicke* in *Middleton* v. *Crofts* (1) relieves us from the necessity of inquiring into the force of the Canons of 1603. These are prescriptions to the clergy, and are binding upon them in all matters which are within the scope of the visitorial power of the Crown as head of the Church. It is not necessary in the present case to inquire how far that visitorial power extends, or how far in matters ecclesiastical the clergy are bound by those canons. On this we express no opi-

(1) 2 Atk. 650.

nion, and we only desire to guard ourselves against being supposed to express an opinion that Convocation, with the assent of the Crown, has a legislative power over the clergy similar to that of Parliament over all subjects. No such question arises here; for if the Canons of 1603 professed to impose a new condition on the right of a patron to present a clerk to a benefice, they did endeavour to affect a right of temporal property, and the judgment in *Middleton* v. *Crofts*, which has always been admired and never questioned, establishes that this was beyond their power. But though the Canons of 1603 could not, *proprio vigore*, impose that condition if new, yet, no doubt, they in many cases merely repeated the ancient law of *England*; and it was open to the counsel for the Appellant to argue, as they did, that the ancient ecclesiastical law of *England* was to the same effect. But we do not think that they establish this merely by shewing (supposing them to have done so) that the general canon law of *Europe* was to the effect for which they contend. It is stated by *Tindal*, C.J., in delivering the opinion of the Judges in *Reg.* v. *Millis* (1), "that the canon law of *Europe* does not, and never did, as a body of laws, form part of the law of *England*, has been long settled and established law." For which position he gives reasons, for which we refer your Lordships to the report of the case.

In *Middleton* v. *Crofts* (already cited) Lord *Hardwicke* says (2): "I have had occasion already to mention the rule laid down in *Caudrey's Case*, that such canons and constitutions ecclesiastical as *have been allowed by general custom and consent within the realm*, and are not contrary or repugnant to the laws, statutes, and customs thereof, nor to the damage or hurt of the King's prerogative, are still in force within this realm as the King's ecclesiastical law of the same. This rule is warranted not only by the reason and nature of the thing, but also by a strong express declaration of Parliament in the preamble to statute 25 Hen. 8, c. 21, concerning *Peter's* pence and dispensations; and though in the proviso at the end of statute 25 Hen. 8, c. 19, for continuing the ancient canon law until the intended reformation thereof should be completed, no mention is made of custom or usage, yet there are words of the same import; and in the Act 35 Hen. 8, c. 16,

(1) 10 Cl. & F. 680. (2) 2 Atk. 669.

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for prolonging that power during the King's life, the proviso for continuing the ancient canons is repeated, and more clearly penned thus: 'Such canons, constitutions, &c., as be accustomed and used here.' Here," continues Lord *Hardwicke*, "rests the sure foundation of all ecclesiastical jurisdiction in this kingdom; and of this a rational and natural account is given in a manuscript treatise of that great and learned Judge Lord Chief Justice *Hale*, which I have perused. 'I conceive,' says he, 'that when Christianity was first introduced into this island, it came not in without some form of external ecclesiastical discipline or coercion, though at first it entered into the world without it; but that external discipline could not bind any man to submit to it, but either by force of the supreme civil power where the governors received it, or by the voluntary submission of the particular persons that did receive it. If the former, then it was the civil power of this kingdom which gave that form of ecclesiastical discipline its life; if the latter, it was but a voluntary pact or submission which could not give it power longer than the party submitting pleased, and than the King allowed, connived at, and not prohibited it, and thus by degrees,' says my author, 'introduced a custom, whereby it came equal to other customs or civil usages.' It remains then to be inquired (proceeds Lord *Hardwicke*) whether that part of the canon law which prohibits clandestine marriages (that being the subject then before the Court) hath been received and allowed in *England*."

We think that these authorities are quite sufficient to justify our position, that it is not enough to shew that such a condition precedent is imposed by the general canon law of *Europe*, or by the Canons of 1603; and we proceed to inquire whether such a condition has ever been received and allowed in *England*, so as to become part of the ecclesiastical law of the realm.

That is a question of law, and in investigating it we cannot do better than follow the example of Lord *Hardwicke* in *Middleton* v *Crofts*, and, borrowing his words, endeavour "to proceed upon sure foundations, which are the general nature and fundamental principles of the constitution, Acts of Parliament, and the resolutions and judicial opinions in our books, and from these to draw our conclusions." He proceeds to say (what will be controverted by none)

that no new laws can be made but by the King, with the consent of both Houses of Parliament.

We think that the conclusion is irresistible, that unless this condition was made part of the law of *England* in the early times, when the law was being formed, it could not become so subsequently, except by statute. No such statute exists. That of the 36 Edw. 3, c. 8, which was referred to on the argument, was but a supplement to the Statutes of Labourers; and, just as those applied only to working men and not to the gentry, so did that statute apply only to chaplains who received wages, and not to the beneficed clergy; besides, that statute, after having long fallen into desuetude, was repealed by 21 Jac. 1, c. 28 (A.D. 1623).

If we come to the second head, the resolutions and judicial opinions in our books, we must observe that we know of no decision or judicial opinion that affords the least countenance to the supposition that such a condition ever was part of the law in this country. No such case was cited at your Lordships' Bar, and, considering the great learning and research of the Appellants' counsel, we think we are warranted in assuming that none such exists. No statement of any text writer or work of authority was produced in favour of it, except one passage in *Gibson's* Codex, which we cannot think of any great weight as an authority on a question of law. Then, when we look at the analogy to the well-established principles of the law, we think that the argument is exceedingly strong that such a condition is inconsistent with, if not repugnant to, the common law.

The *Statute of Westminster* was passed mainly to give patrons an effective remedy when the bishop had infringed the patron's right by instituting a clerk not presented by the patron. It has been followed by a long series of decisions, establishing that the bishop must, in order to defend himself in a *quare impedit*, allege that the clerk presented was in fact not fit, and that this is traversable. Even where the bishop knows of his own knowledge (or thinks that he knows, for it is to be remembered that he is fallible) that the clerk is *criminosus*, though he may refuse him on that ground, yet in his plea he must assert positively that he is *criminosus*, in order that issue may be taken thereon. The whole scheme of the law, in fact, is framed to secure that the patron may

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have the right in every case of having the bishop's conduct examined, and that his decision shall never conclude the temporal right. We think it repugnant to this that such a condition as is contended for should exist.

In the early times, when, if at all, this condition must have been introduced, the whole of *Europe* was of one communion, and if a priest was ordained at one of the foreign universities, the testimony of the bishop of the diocese in which that university lay would be as essential as that of an English bishop. Is it credible that, when the common lawyers and the Legislature were so jealously guarding the rights of the patron against his own bishop, by providing that nothing he did should conclude the patron, but all be subject to review in the temporal Court, they should have left those rights completely at the mercy of the foreign bishop, who might not even be a subject of this realm, and whose refusal to grant a testimonial would be final?

It is clearly established that the bishop cannot defend himself by saying, "*I* believe the clerk to be unfit, and therefore I did not examine him;" but that to make a good plea he must say he was unfit, and that allegation is traversable. The contention on the part of the Appellant is that he may plead that the foreign bishop does not even say he *is* unfit, but only does not choose to certify affirmatively that he is fit, and this is to be a good plea; though there is no power whatever to compel the foreign bishop to give such testimony, or to render his reasons for refusing it: it is no plea to say, "I think him bad," but it is a plea to say, "the foreign bishop don't choose to say he thinks him good." We think this is so repugnant to the whole policy of the law on this subject that it would require the strongest authority to establish such an anomaly, and, as we have already pointed out, there is absolutely no authority for it.

For these reasons we give our opinion that the plea is bad in substance, and, that being so, the special verdict ought to be found for the Plaintiff, unless every part of the plea is proved, which is not the case.

If your Lordships should, contrary to the view we take of the case, think the plea good, it would become necessary to consider the validity of the replication, which, in the view we take of the plea, is immaterial.

MR. JUSTICE WILLES:—

My Lords, in my opinion the plea is naught, and there ought to be a judgment for the patron; upon the simple and only ground that the right of a patron is to present any fit person, and that the plea does not state (as it ought, *Mallory, Qua. Imp.* 87 to 89) the person presented to have been in fact unfit, but only shews that a bishop was not so satisfied of his fitness as to give him a special testimonial, and that another bishop suspected him of simony.

The key to the right decision of this case is the elementary proposition, that a patron is entitled effectually to present any fit person, that is to say, a person of the canonical age, in orders (or, at least, who can obtain ordination before admittance), of sufficient learning, and against whose orthodoxy and morals no charge can be established.

The plea is, not that a fit person was not presented, but that the person presented was not certified to be fit by the bishop of the diocese in which he last had cure of souls. In other words, it professes to make the refusal of that bishop a conclusive bar, whether such refusal was founded upon judgment, prejudice, suspicion, or caprice; and whether, if founded in judgment, such judgment was erroneous or not.

It is now obvious to my mind—though I have thought over it till I doubted, and again till I returned to a clear conviction—that the veto of another bishop can, in reason and in law, only avail to the same extent and under the same circumstances as that of the bishop who is to admit; and therefore can be absolute only when the bishop has an absolute discretion, as in the case of stipendiary curates, and others having no benefice. To hold otherwise would be to abolish the remedy of the clerk and that of the patron in every case where the former comes from a foreign diocese.

The remedy of the clerk is by *duplex querela*, a remedy resorted to with effect in the memorable case of *Gorham* v. *Bishop of Exeter* (1). In that case, upon the presentation of Mr. *Gorham* by the Lord Chancellor to a Crown living, the bishop, after questioning him for five days as to baptism and the necessity for preventive or prevenient grace to its sacramental efficacy, declined to testify or admit. That refusal was upheld in the Court of

(1) Moore's Report of *Gorham Case*.

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Arches upon a proceeding by *duplex querela;* but upon appeal to the Queen in Council the refusal of the bishop and the judgment of the Court of Arches were quashed. Bitter complaints were there made of the vagueness of the charges of heresy; and those complaints had judicial sanction. It is impossible to read the proceedings without being satisfied of the good sense of the decisions which require the bishop to shew directly and specifically what the objection to the fitness of the presented clerk is, or without feeling that not one tittle of the law therein laid down ought to be stirred.

If this plea be valid, the only question to be tried upon *duplex querela* would be whether there was or was not a testimonial. In other words, the clerk would be at the mercy of the foreign bishop, and might be refused without cause and without appeal.

The remedy of the patron is by action at common law. To try what? Of course to try, first, whether the patron had the right to present; and, secondly, if so, whether he has presented a fit person. The former is not questioned. Who is to decide the latter? The answer is easy—the Court of common law. Therefore, a plea founded upon unfitness must, in the first instance, shew an unfitness which the Court can recognise as a disqualification, and not mere inconclusive evidence of unfitness. If the plea sufficiently shews unfitness, then its truth is to be tried either by a jury, if the cause be a crime, or by the certificate of the metropolitan if it be insufficiency: for which purpose the Court of common law, according as the case may be, either summons a jury or sends a writ to the metropolitan, commanding him in the Queen's name to try the question, and to certify the result to the Court. And that inquiry must take place according to legal rules of evidence; for, even in cases within the jurisdiction of the Ecclesiastical Courts, the Courts of common law restrain those Courts by prohibition when they require evidence inconsistent with the common law, as, for instance, two witnesses to a payment.

Such being the course of proceeding in *quare impedit* (and surely a very reasonable and just one), leaving questions of law to the Court of law, of criminating fact to the jury, and doctrine to the metropolitan, the plea seeks to make it a condition precedent to the jurisdiction of those constituted authorities, in every case in

which the clerk comes from a foreign diocese, that he shall be able to procure (not that he shall deserve) the testimonial of the foreign diocesan. What is this but to say that the patron has not the right to present any fit person, but has only a right to present any fit person who may happen to reside in the diocese, or such a fit person happening to reside in another diocese as may be able to obtain the special testimonial of the diocesan.

What is the character of this testimonial? Is it a judgment as to the fitness of the clerk? Not so, for then it would equally bind the bishop, though he knew of his own knowledge that the clerk was unfit. But if it be not a judgment when given, how comes its refusal to be conclusive against the clerk? If he cannot obtain it by entreaty, has he a right to be heard, and how is he to enforce that right? Has the patron any such right? Which metropolitan is to set the bishop right? And how can he be set right when he does not shew the cause of his refusal? No solution was attempted of these difficulties; but it was broadly insisted that the law is such because the canon law is such, and that the canon law to this effect has been adopted into the law of *England*.

Upon these assertions, I observe simply that there is no proof of the adoption into the law of *England* of a canon repugnant to the right of the patron to present *any* fit person; and the canons, or rather the reading of the canons, upon which this plea is founded, are, or is, for the reasons stated, inconsistent with such right, and therefore no part of the law. No vestige of such law is found in our books, except once in the *Bishop of Peterborough's Case*, where it was not acknowledged; and the statutes of *Henry* VIII. do not set up any canon not consistent with common law rights.

The ancient canons, so much relied upon, sprang from a very different state of society, and seem to have been framed upon a notion of local allegiance that has small place in our system. They are, for instance, equally stringent upon bishops leaving their dioceses as upon clerks leaving their bishops. They seem to have originated in times when learning and clerks were scarce, and they are directed indifferently against all ecclesiastical persons who leave their proper flocks or shepherds, and wander into other pastures. The church was universal, but each particular diocese had a right to the services of its own clergy, who had not leave to

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depart therefrom. If those canons were now in force, it may be doubted whether any distinction could be made between the testimonial of the Patriarch of *Constantinople* or the Archbishop of *Toledo* and that of a prelate of the Church of *England*. Beyond doubt, none could consistently be made between *Manchester*, *Jerusalem*, and *Capetown*.

As time went on, and the canon law assumed its more complete form, provisions were made for the exercise of the *jus patronatus*; and they are to be found under distinct and independent heads in the same digest, with adaptations of the ancient canons as to clergy coming from foreign dioceses without call or provision. As I read them, the former made the right turn upon fitness, the condition throughout being that the person presented should be *persona idonea*, whilst the latter required the letters dimissory of the foreign bishop. Light is thrown upon this distinction by the elaborate provisions of the Council of *Trent* as to the *jus patronatus* (1), by which, in case of presentation, a board of examiners decides upon the question of fitness; and those as to errant clergy (2), which latter require consent or letters dimissory of the bishop. If it were essential to ascertain the exact construction of these ancient documents, I should have required more time to consider. It is enough, however, to say that there is no trace of the introduction of them into *England* as part of "the King's ecclesiastical law," to the prejudice of the right of the patron, and that their introduction to the extent or in the sense insisted on by the bishop would, as already shewn, dock the patron's right.

As to the Canons of 1603, I agreed in, and adhered to, the construction put upon them in the Court of Common Pleas, according to which the 39th is the canon applicable to this case; and that has been complied with. I collect from the Report of the *Gorham Case* (3), that the Lord Chancellor, who (probably because his office has come down through ecclesiastics) seems to require the same testimonial as do the bishops, must have been advised that the 39th was the canon in point. Were, however, this construction of the canons erroneous, it could make no difference in my opinion, for it is clear that the Canons of 1603 do not, *proprio*

(1) Session xxiv. de Reformatione, c. xviii.
(2) Session xiv. de Reformatione, c. ii. *et seq.* (3) By *E. F. Moore*, Esq.

vigore, bind the laity, nor the clergy as to their temporal possessions (Lord *Hardwicke's* judgment in *Middleton* v. *Crofts*) (1), and an advowson is a temporal possession. As to how far, otherwise than in conscience, Canons of 1603, not declaratory of ancient canons adopted into the law of *England* before the records of Parliament, bind the clergy, I reserve my opinion.

One word in conclusion as to the deeply responsible position of the bishop, whose acts ought to be regarded, not only with deference, but with the strongest desire to uphold them so far as they can be reconciled with the law. Every one must sympathize with the condition of a conscientious prelate called upon to induct a person of indifferent character or qualifications, and unable to refuse such a candidate because he cannot lay his finger upon any specific act falling within the category of causes of deprivation; but the law requires him to give a decision open to appeal. Whether a change in the law, by which persons of whose worth there is a grave or just suspicion may be excluded, can be made consistently with the rights of patrons, is a question for higher minds. I can only declare my opinion as to the existing law to be, that the bishop is entitled to a reasonable time and opportunity to inquire of the fitness of the person presented; that he may endeavour to satisfy himself by all lawful means upon that point, and either admit or refuse; and that in case of refusal, or, what is equivalent to it, collating his own clerk, he must be prepared to state directly and specifically upon what ground, so that the justice of his refusal may be inquired into in due course of law. The ill opinion of himself or of another bishop will not suffice; suspicion will not suffice. The distinctions are not unfamiliar between *personam—peccantem in conscientiâ populi, criminosam—suspectam de malo.* In this case, as in all others where a criminal offence is suggested as a disqualification, it must be distinctly alleged and proved; and if it be not sufficiently alleged, or if it be alleged and not proved, the presumption whereby every one is treated as innocent until he is shewn to be guilty, must prevail.

With profound respect for the quarter whence this plea comes, and for the great learning and ability with which it has been maintained, I am satisfied that it is insupportable; and that (as

(1) 2 Atk. 664.

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the defence must stand or fall *secundum allegata et probata*) the judgment upon the whole record ought to be for the patron.

Since writing this opinion I have seen that prepared by my brother *Blackburn*, which, so far as it goes, has my entire assent. Inasmuch, however, as what is above written treats the case in some respects differently, though with a like result, I venture, upon a question of so great importance, to submit to the House the considerations which have influenced my mind in my own words.

MR. BARON MARTIN :—

My Lords, I also am of opinion that judgment ought to be entered for the Plaintiff below, the Defendant in Error.

I have written a judgment upon the case; but as I entirely concur with those of my brothers *Willes* and *Blackburn*, it would be an unnecessary occupation of your Lordships' time to deliver it.

It will suffice, therefore, to state that I am of opinion that the plea is bad in substance upon three plain grounds.

1st. Because the 48th Canon does not apply to institution to benefices at all.

This was the unanimous judgment of the Courts of Common Pleas and Exchequer Chamber, and their reasons seem to me conclusive.

2nd. If it did, there is no authority whatever that the part of the 48th Canon, upon which the plea is framed, is or ever was adopted into the common law of *England*, by which alone the plea is to be judged.

3rd. That the plea ought expressly to aver the reason of the unfitness of the clerk, so that your Lordships could judge of its sufficiency upon demurrer, and the patron could deny its truth, and that too whether the reason might be spiritual or temporal. If such was not the law, property in a lay advowson would be valueless.

I also myself think the plea bad for want of an averment of notice. In the part of the 2nd Institute, which has been so frequently referred to, Lord *Coke* states when notice to the patron is necessary and when not. I think the present case falls within the reason of the instances when notice is necessary.

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Upon these grounds I think this plea is bad, and they are all substantial grounds, and not at all of a formal and technical character.

If your Lordships agree with us, the judgment upon the whole record will lie for the Defendant in Error; but if you do not,—it will be necessary to consider as to the validity of the replication, and also what judgment ought to be given upon the special verdict.

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March 30.

LORD CHELMSFORD:—

My Lords, I am of opinion that the judgment of the Court of Exchequer Chamber, affirming the judgment of the Court of Common Pleas in favour of the Defendant in Error, ought to be affirmed.

The principal question raised by the demurrer to the plea of the Bishop of *Exeter* is, whether he had a right to require of the clerk presented to him by the patron of the living for admission, institution, and induction, testimony from the Bishop of *Manchester* of the clerk's honest conversation, ability, and conformity to the ecclesiastical laws, of the sufficiency of which testimony he (the Bishop of *Exeter*) was to be the sole judge.

In considering this question, it must be borne in mind that we are dealing with a temporal right of property. An advowson is by the law of *England* a lay inheritance. Its fruit or benefit is, that upon a vacancy of the living the owner possesses a right to present to the bishop a person in holy orders to be admitted and instituted. The only obligation which the law imposes upon him in the exercise of this right is that he should present a fit person. It is the duty of the bishop to ascertain the fitness of the clerk presented to him. If the bishop refuses admission upon the ground that the presentee is not a fit person, the patron is entitled, under the *Statute of Westminster*, 2, c. 5, to sue in *Quare impedit* to compel the admission of his clerk, or to require the bishop, by plea to the action, to shew the cause of his refusal, of the sufficiency of which plea the Court is to judge.

That this is the regular course of proceeding appears from the following passage in 2nd Institute, p. 631: "In a *quare impedit* brought against the bishop for refusal of the clerk, he must shew

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the cause of his refusal specially and directly (for whether the cause be spiritual or temporal, the examination of the bishop concludes, not the Plaintiff) to the intent the Court may resolve whether the cause be just or no, or the party may deny the same; and then the Court shall write to the metropolitan to certify the same; or if the cause be temporal, and sufficient in law (which the Court must decide), the same may be traversed, and an issue thereupon joined," &c. From this passage it is clear that the judgment of the bishop, and his refusal to admit the clerk upon the ground of unfitness, is in no case final.

The plea of the bishop founds his rejection of the clerk upon the absence of a sufficient testimonial from the Bishop of *Manchester;* and in support of the plea it was contended by his counsel that such a testimonial, from a bishop, of a clerk coming from one diocese to another, has been an established principle of the Church from the earliest period. Authorities for this proposition were, with great learning and research, drawn by them from the decrees of councils, from ancient constitutions and canons of the Church, and from the works of eminent writers upon ecclesiastical law. And they relied also upon the 48th of the Canons of 1603, which canons they described as embodying in them in many of their particulars the ancient law of the Church.

With respect to the reliance placed upon the law of the Church in support of the bishop's plea, it is sufficient to observe, in the words of Chief Justice *Tindal*, in the case of *Reg.* v. *Millis* (1), "that it has long been settled and established law that the canon law of *Europe* does not, and never did, as a body of laws, form part of the law of *England*." "Such canons and constitutions ecclesiastical, indeed, as have been allowed by general custom and consent within the realm, and are not contrary or repugnant to the laws, statutes, and customs thereof, nor to the damage or hurt of the King's prerogative, are" (as Lord *Hardwicke* said in *Middleton* v. *Crofts*) "still in force within this realm as the King's ecclesiastical law of the same."

Even then, if the ancient law of the Church gave such power to the bishop as is relied upon in the plea, as there is no proof that it was ever "allowed by general custom and consent within this

(1) 10 Cl. & F. 680.

realm," if such power exists some other ground of support must be sought for it.

This, it is said by the counsel for the bishop, is to be found in the 48th of the Canons of 1603.

According to the opinion of Lord *Hardwicke* in *Middleton* v. *Crofts*, these canons in general do not bind the laity *proprio vigore*, though some of them which are "declaratory of the ancient usage and law of the Church received and allowed here may, by virtue of such allowance," be binding upon the laity. No such acceptance and allowance can be pleaded in favour of the right of the bishop to require the particular testimonial upon the non-production of which he refused to admit the Plaintiff's presentee, even if the 48th Canon gave him such right, and applied to the case. However binding, therefore, this canon may be on the clerk presented for admission, I do not see how it can affect the temporal right of the patron to present a fit person to the bishop, and to question the bishop's power to impose any condition upon his admission except such as has been sanctioned by long-established usage, and is reasonably necessary to enable the bishop to judge of the fitness of the person presented.

The plea of the bishop states that the farther and sufficient testimony which he required from the clerk presented to him for admission was, "Testimony from the Bishop of *Manchester* of the presentee's honest conversation, ability, and conformity to the ecclesiastical laws of *England*." This testimony, in the case of curates and ministers removing from one diocese to another, must, by the 48th Canon, be obtained from the bishop of the diocese whence they came. But the canon does not apply to institutions to benefices, but only to the service of cures. This appears to me to be clearly shewn by the preceding canons, 45, 46, and 47, which give an interpretation to the words "curates and ministers" in the 48th Canon.

The canon which really applies to the case of clerks presented to the bishop for admission is the 39th, which is headed "Cautions for institution of ministers into benefices," and which is in the following words: "No bishop shall institute any to a benefice who hath been ordained by any other bishop, except he first shew unto him his letters of orders, and bring him a sufficient testimony of his

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former good life and behaviour, if the bishop shall require it, and, lastly, shall appear upon due examination to be worthy of his ministry." The "sufficient testimony" required by this canon has, by long-established practice, consisted of a testimonial by three beneficed clergymen, countersigned, if they are not beneficed in the bishop's diocese to whom the testimonial is given, by the bishop of the diocese in which the benefices are respectively situate, that the presentee has been personally known to them for three years last past; that they have had opportunities of observing his conduct; that during the whole of that time they verily believe that he lived piously, soberly, and honestly, and that they have not heard anything to the contrary thereof, nor that he has at any time held, written, or taught anything contrary to the doctrine or discipline of the Church; and that they believe him to be, as to his moral conduct, a person worthy to be admitted to the benefice. This "sufficient testimony," it is averred by the replication, was produced by the presentee of the Plaintiff to the bishop. Neither the language of the canon, nor the established practice in the case of the admission to a benefice of a clerk coming from another diocese, sanctions the requisition of the bishop that he should bring with him the testimonial which is required by the 48th Canon of his honesty, ability, and conformity to the ecclesiastical laws.

The plea of the bishop not only alleges that he was entitled and bound, and ought, by the laws ecclesiastical of *England*, to require, have, and receive such testimony from the bishop of the diocese whence the presented clerk had come, but also that it was for him to adjudge whether it was sufficient, and to require farther testimony, if he thought fit; and in the event of such farther testimony satisfactory to him not being produced after the lapse of six months from the avoidance of the living, to collate a clerk of his own, and all this without notice to the Plaintiff, the owner of the advowson.

If this plea be good, it is immaterial that the clerk presented should be perfectly fit, of the lawful age, in holy orders, and his learning and morals beyond all exception, or that all the bishops in *England*, except the bishop of the diocese where he held cure of souls, should give testimony to his fitness; still, if the bishop of the diocese whence he came did not give such a testimony as the bishop of the diocese in which the benefice to which he is

presented is situate adjudged sufficient, the owner of the advowson, after the lapse of six months, without any notice, would be deprived of his right of presentation. The patron would, under such circumstances, be at the mercy of the bishop, who capriciously, or, at all events, of his own mere authority and absolute will, might adjudge in his own mind that the testimony was not sufficient, without any appeal, or possibility of appeal, to a legal tribunal. This would be quite contrary to the right of the patron to challenge the rejection of his presentee, and to enforce his right of presentation by *quare impedit*, "unless the bishop specifically states in his plea some reasonable cause wherefore the clerk presented is not fit" (*per* Lord *Ellenborough, Rex* v. *Archbishop of Canterbury* (1)). The cause shewn by the bishop in his plea must be one upon the sufficiency of which, in point of law, the Court may decide, or which may be traversed and issue joined upon it, to be tried, if the cause be spiritual, by the certificate of the archbishop, and if temporal, by a jury.

But the cause of refusal to admit the Plaintiff's presentee, which is averred in the plea, takes away from the Court all power of judgment in the matter. It asserts a right in the bishop finally to decide upon the rejection of the presentee, without assigning any reason, and consequently without any possibility of appeal from his decision. This is utterly repugnant to reason, and to the authorities which have decided that the patron may protect his temporal right of presentation by calling upon the bishop to shew, by plea to a *quare impedit*, such a cause for his refusal to admit the presentee as a Court of law may inquire into and determine upon as to its sufficiency.

I think the plea is also objectionable for want of an averment of notice to the Plaintiff that the clerk had not, in the judgment of the bishop, produced to him sufficient testimony of fitness to be admitted. The right of presentation to a living is (as has been already stated) a mere temporal right. If the patron presents a fit person, who produces all the proofs of his fitness which the bishop can rightfully require, it is the right of the patron to have his clerk admitted. If, for any reason determined upon by the bishop, the clerk should prove unfit, the patron is clearly entitled

(1) 15 East, 117.

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to notice, as he might acquiesce in the bishop's judgment, and present another person to him for admission. It would be unjust and unreasonable that the bishop should be at liberty to wait the lapse of six months without any notice to the patron, and then, acting upon his own secret judgment, collate his own clerk to the living.

For these reasons I think that the judgment of the Court of Exchequer Chamber is right and ought to be affirmed.

LORD CRANWORTH:—

My Lords, the opinions that were given in your Lordships' House by the learned Judges seem to me entirely to exhaust this subject. The case turns entirely upon the sufficiency of the plea of the Bishop of *Exeter* in a proceeding of *quare impedit*, with reference to the living of *Tregony*, in the county of *Cornwall*. The plea of the bishop, after stating that the church is in his diocese, and that he only claims as bishop, goes on to state that the Plaintiff, after vacancy, presented *John Reid* as his clerk; that *Reid* had not been ordained by him as Bishop of *Exeter*; that *Reid* came from a foreign diocese, viz., the diocese of *Manchester*, in which he had then lately held a benefice with cure of souls; and that *Reid* did not produce from the bishop of the diocese from which he came any sufficient testimony according to the ecclesiastical laws of *England* of his honest conversation, ability, and conformity to the ecclesiastical laws of *England*, or such testimony as a bishop ought to require and have from the bishop from whose diocese he came; that *Reid* brought testimony from the Bishop of *Manchester* which he (the Bishop of *Exeter*) held not to be, and which was not, sufficient testimony, according to the ecclesiastical laws of *England*, of *Reid's* honest conversation, ability, and conformity to the ecclesiastical laws of *England*, or such testimony as a bishop ought to receive according to law; and that the bishop informed *Reid* that it was not sufficient, and that the bishop required farther testimony. These are the averments of the plea. It goes on to state that *Reid* departed and never returned, and farther testimony was not produced, though sufficient time was allowed. Then it goes on, by way of addition, that before the collation after mentioned in the plea, the bishop received from the Bishop of *Man-*

chester farther testimony, from which he had reason to believe, and did believe, that *Reid*, while beneficed in the diocese of *Manchester*, had been guilty of an attempt to commit simony, by soliciting one *Francis M. Knollis* to enter into a simoniacal contract touching another benefice then held by *Reid*, and that he was not a person of honest conversation, &c., all which was known to *Reid*. Wherefore, after a lapse of six months, the bishop says he presented *Borwell*.

Now the question is, whether that is a valid plea. Whether it affords a good answer to the complaint of *Marshall*, that the bishop has refused to institute his clerk whom he presented. The Judges unanimously say that that is a bad plea; and I am clearly of opinion that the Judges are right.

Mr. Justice *Willes* says: "The key to the right decision of this case is the elementary proposition, that a patron is entitled effectually to present any fit person—that is to say, a person of the canonical age, in orders (or, at least, who can obtain ordination before admittance), of sufficient learning, and against whose orthodoxy and morals no charge can be established." No one can question this as being a true exposition of the law, and it follows, as a corollary, that a bishop refusing, on vacancy of a benefice, to institute a clerk duly presented by the proper patron, must state that the presentee is not a fit person to be instituted, and must aver directly why he is unfit: that is, he must aver some ground of objection, depending either on matter of fact or matter of law, in order that, in the one case, the validity of the objection may be tried by a jury, and, in the other, may be decided by the Court. Here no such objection is stated. It is merely stated that the Bishop of *Manchester* did not furnish a testimonial which the Bishop of *Exeter* says, according to the ecclesiastical law of *England*, he was entitled to require. Whether he was so entitled to require, is the question to be determined. Now, a clerk in such case has no means whatever of compelling the bishop from whose diocese he comes to give him a testimonial. It is consistent with the plea that *Reid* is a perfectly learned, pious, and orthodox clerk; but yet, if the plea is good, he has no means of obtaining institution, and the patron is deprived of his temporal right. The earned Judges have so entirely exhausted the case, that I do not

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think I should be usefully occupying your Lordships' time if I did more than say that I entirely concur, not only in the result at which they have arrived, but in the grounds upon which they found their judgment.

LORD WESTBURY:—

My Lords, an advowson, or right of patronage to a living with cure of souls, is, according to our law, a lay fee or temporal inheritance, and its ownership and mode of enjoyment are determined by the common law. Ecclesiastical law has no farther room for interference than this, that the owner of the advowson is bound to present a clerk fit in doctrine, learning, and morals; and that, if the clerk be unfit, the bishop may object to institute him. But if the bishop refuses to institute, he is bound by law to state his objection in a precise and definite manner, so that the patron may be able to have the validity or truth of the objection tried by law; that is, by the common law Courts, if it be an objection founded on immorality, and by the metropolitan if the objection be for error in doctrine or insufficiency of learning. The present case depends on the sufficiency of the ground of refusal as set forth in the plea.

It is obvious that of the sufficiency of the presentee in point of learning and doctrine the bishop may satisfy himself by personal examination, but on the point of moral conduct the bishop must depend upon external evidence. On the inquiry, therefore, as to the fitness of the clerk in point of morals, it seems necessary that he should bring to the bishop some testimony or certificate touching the honest conversation of his antecedent life. And the question then arises, whether the law requires for this purpose any precise or defined form of testimonial.

The bishop contends at the bar that by the immemorial law of the Church, in cases where the presentee has previously had cure of souls in another diocese, it is incumbent on him to bring letters of testimonial from the bishop of that diocese; and his counsel cited, with much diligence and learning, many books, and authors who have written on the canon law, for the purpose of proving that this was the established rule and usage of the Church previously to the Reformation.

If it had been pleaded and proved that this alleged old rule and usage had been received, observed, and acted upon in the Church of *England* since the Reformation, it is possible that it might have been shewn that this particular kind of testimonial was, by law, an essential criterion of the moral idoneity of the clerk, but this is not the case actually raised by the plea; and it may be matter of regret that from the defects of the pleading the real defence, probably, has not been raised. The plea does not distinctly state that by ecclesiastical law, as received and prevailing by general consent and custom throughout the realm, and therefore part of the common law, the certificate of the former bishop is a necessary condition of the fitness of the clerk; nor does it aver that it has been the invariable practice and usage of the Church, and of the Anglican Church in particular, for the bishop to whom the clerk is presented to require and receive from the former bishop such a testimonial. In fact, there is no statement of the usage or practice of bishops in this respect, but simply an averment that the clerk did not at any time bring with him a sufficient testimony from the bishop of the former diocese, or any such testimony, as he, the Bishop of *Exeter*, was bound and ought by the laws ecclesiastical of *England* to require, have, and receive from the bishop of the diocese whence the clerk came.

In consequence of the want of such a testimonial, the bishop declined to make any inquiry into the moral fitness of the clerk, or to receive the testimony of any other persons, but peremptorily rejected the presentee.

To justify this refusal the bishop appeals to the laws ecclesiastical. It is incumbent on him to shew either some written law binding the clergy, or a general usage, which may be taken as evidence of law from which the legality of imposing such a condition is shewn, or may be inferred. No decided case, or writer of authority, has been cited for the purpose of shewing that such a condition has been recognised in any of our Courts of justice. Whatever, therefore, may have been the canon law prior to the Reformation in this respect, there is nothing to shew that it became part of the common law of this realm.

The question remains whether the case of the bishop can be supported by the Canons of 1603, and particularly by the 39th and

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48th of those canons, or either of them. It is true that the Canons of 1603 do not bind the laity nor the clergy as to temporalities: but they will be authority if they lay down any rule as to the fitness of clerks presented by lay proprietors of advowsons, inasmuch as the idoneity of the clerk and the mode of examining into it by the bishop fall properly within the scope of ecclesiastical law.

The bishop appeals particularly to the language of the 48th Canon, the words of which are set forth in his plea, and he contends that the word "curate" is to be taken in the largest sense, so as to include clerks presented for institution to benefices. But it is not possible to adopt this construction when attention is given to the preceding 39th canon, which is expressly entitled "Cautions for Institution of Ministers into Benefices." And as the directions in the 39th Canon differ in some important particulars from the directions in the 48th, it is not to be supposed that two inconsistent sets of rules were intended to be laid down touching the institution of clerks. The class of persons intended to be designated by the words "curates" and "ministers," seem to be unbeneficed clerks who were employed to perform spiritual duties in the benefices of others, with the sanction of the ordinary, and who might properly be required to bring letters dimissory from the bishop of the diocese where they had been previously employed.

The 39th Canon, therefore, in the absence of the plea and proof of uniform usage, and of any other judicial authority, is the only evidence of the law ecclesiastical on the subject of this plea. And it is clear that it by no means warrants the position, that the bishop is entitled to require the testimonial of the former bishop as a precedent condition to his institution of the presentee.

The rule contended for by the Bishop of *Exeter* would certainly open the door to very arbitrary and capricious proceedings, rendering the title of the clerk and the right of the patron entirely dependent on the will of the prior bishop. Such a conclusion is at variance with reason, and therefore repugnant to what is called "the policy of the law." At the same time, if such a rule had been pleaded by the bishop to have been the invariable usage of the church from the earliest times down to the Reformation, (which would be evidence of its being a law of the Church,) and that it had been

continued and uniformly recognised and acted upon by the bishops of the Anglican Church since the Reformation, (which might have shewn it to have been received and adopted as part of the law ecclesiastical recognised by the common law,) the fitness of the rule ought not to be questioned. Nothing of this kind has been proved, nor could it be averred, consistently with the language of the 39th Canon, which requires only that the presentee shall bring a sufficient testimony of his former good life and behaviour, if the bishop shall require it—a rule which enables him to obtain sufficient testimony from any competent quarter, without confining him to the sole discretion and opinion of the former bishop.

For these reasons, I am of opinion that the judgment of the Court below ought to be affirmed.

Judgment of Exchequer Chamber affirmed.

Lords' Journals, March 30, 1868.

Attorney for Plaintiff in Error: *George E. Philbrick.*
Attorney for Defendant in Error: *Compton Reade.*

ELIZABETH M. SHAW AND OTHERS . . . APPELLANTS;
AND
THOMAS GOULD, J. W. MOORE, AND OTHERS . . . . . RESPONDENTS.

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March 27, 30, 31; *May* 7.

Marriage—Divorce—Foreign Jurisdiction—"Lawfully begotten."

A foreign tribunal has no authority, so far as any consequences in *England* are concerned, to pronounce a decree of divorce *à vinculo* in the case of an English marriage between English subjects, unless such subjects are, at the time of such decree pronounced, *bonâ fide* domiciled in the country where that tribunal has jurisdiction, and the suit is prosecuted without collusion.

Where, therefore, there was an English marriage between two English persons, who, however, never lived together, but the husband committed adultery, and some years afterwards consented to go to *Scotland* to found jurisdiction against himself, and did so, and the Scotch Court pronounced a decree of divorce *à vinculo*:

Held, that a Scotch marriage duly celebrated between the divorced wife and an Englishman (who was thenceforth domiciled in *Scotland*), did not give to the children of their union the character of "lawfully begotten," so as to enable them to succeed to property in *England*, for that the Scotch divorce had not dissolved the English marriage.

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Lolley's Case (1) commented on and explained.

Quære, whether, supposing collusion to have existed between the parties to the suit in which the decree was pronounced, it can be set up as a ground for invalidating the divorce, and so bastardising the issue of a second marriage after both the parties to the suit are dead.

Per LORD WESTBURY:—*Quære*, whether the claim of the Scotch Courts to dissolve a foreign marriage for adultery is not restricted, by Scotch decisions, to adultery committed in *Scotland* itself.

Per LORD WESTBURY:—A foreign Court may settle the conditions on which it will exercise its jurisdiction; those conditions being fulfilled, it may exercise that jurisdiction, but the judgment given under such circumstances cannot claim extra-territorial authority unless pronounced in accordance with the rules of international public law.

2 P. Wms. 160 — 342. 11 Eq. 476 2 P. Wms 438 14 Eq 339. 1 R.D. 145 5 P.D 153, 14 C.D 626 6 P.D 34 38, 48 7 C.D. 268 28 C. 295 8 App. Ca. 4, 55, 62 24 C.D 640

JOHN WILSON, of *Stenson*, in the county of *Derby*, made his will, dated the 27th of February, 1832 (duly executed to pass real estate), and after directing payment of debts, &c., bequeathed to trustees one moiety of his personal estate in trust for his great-niece, *Elizabeth Hickson*, for her life, and after her death upon certain trusts for the benefit of her *child*, or *children*, or *issue*; and in case she should not have any child or issue, upon trust for his nephew, *Ambrose Moore*, his executors, &c. He devised his real estate to trustees during the life of his great-niece, *Elizabeth Hickson*, for her separate use, remainder to the trustees for 500 years, to raise portions for her younger children, and, subject thereto, to the first son of the body of the testator's said great-niece lawfully begotten, and the heirs of his body, &c., remainder to every other son of the body of his said great-niece lawfully begotten, and his heirs successively, &c., remainder to the use of the daughters of *Elizabeth Hickson* lawfully begotten, as tenants in common in tail, remainder to the use of *Ambrose Moore* for life, remainder to his first and other sons in tail.

On the 10th of June, 1828, *Elizabeth Hickson*, being then about sixteen years of age, was induced by the fraud of a person named *Buxton*, to contract a marriage with him. The marriage was never consummated, and for his fraudful act *Buxton* was indicted, and convicted, and sentenced to three years' imprisonment. No formal dissolution of this fraudulently-procured marriage ever took place, and in December, 1838, a formal deed of separation was executed by *Buxton* in consideration of a sum of money then paid to him,

(1) Fac. Coll. 20th March, 1812; Russ. & Ry. 237; 2 Cl. & F. 567.

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and of the grant of an annuity for life. In 1844, a Mr. *John Shaw*, who was then studying for admission to the English Bar, addressed proposals of marriage to the lady, who, notwithstanding what had passed, still continued to be called *Elizabeth Hickson*, and his proposals were favourably received, but it was doubted whether any lawful marriage could take place between them until that which had once been solemnized with *Buxton* was formally dissolved.

Buxton, after undergoing his sentence, had cohabited in the county of *Derby* with one *Sarah Lant*. A suit for a divorce on the ground of adultery was, in June, 1844, instituted by *Elizabeth Buxton*, or *Hickson*, in the Arches Court of *Canterbury*, but was not persevered with. Negotiations were then opened with *Buxton* to induce him to go to *Scotland* for a time necessary to give the Scotch Courts jurisdiction in a divorce suit. These negotiations resulted in an agreement that *Buxton* should go to *Scotland*, and remain there a certain time. He was to receive £40 for his expenses: in case he should be divorced he was to receive £250 within three months from the death of a person named in the agreement, with interest thereon until that time; this sum "to be forfeited if he gave or caused to be given such information as would be prejudicial to the divorce." He was, on the divorce being pronounced, to receive a farther sum then in the hands of the lady's trustees, to retain his annuity, and if he had to stay in *Scotland* more than eight weeks he was to receive £5 a week in addition. At the end of November, 1844, *Buxton* went to *Scotland*, and took up his residence first at *Dumfries*, and then at the neighbouring village of *New Abbey*, where he continued until the end of January, 1845. On the 16th of January, 1845, he was served with a summons in a suit for a divorce issued out of the Court of Session, at *Edinburgh*, at the suit of *Elizabeth Buxton*. This suit was not prosecuted to a decree, but another was commenced in November, 1845, to which *Buxton* put in defences that he and his wife were natives of *England*, that the marriage was English, that the proper domicile of the parties was *England*, and that the Scotch Court had no jurisdiction to pronounce a divorce. The Court, however, proceeded with the suit, in which a decree, declaring the marriage dissolved on the ground of adultery, was pronounced in March, 1846.

In June, 1846, *John Shaw* and *Elizabeth Hickson* were in due

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form married in *Scotland*. Mr. *Shaw*, instead of returning to *England* and coming to the English Bar, became an advocate at the Bar of *Scotland*, and was thenceforth domiciled in that country. He resided in that country up to the time of his death, which happened in September, 1852. *Buxton*, who had at once returned to *England*, predeceased him by several months. There were three children of this union, the Appellants in the present case. Mrs. *Shaw* died on the 28th of July, 1863.

On the 3rd of July, 1865, the Appellants, by their next friend, presented a Petition to the Lord Chancellor, praying for maintenance out of the trust funds, which had been paid into Court under the *Trustee Relief Act*. On the 14th of March, 1865, *Ambrose Moore*, and other parties, claiming to be interested in these funds in case the Appellants should be declared not entitled to them, presented a Petition in the nature of a cross-Petition, setting forth their own claims, and denying those of the Appellants, alleging that the Appellants were not the children lawfully begotten of the said *Elizabeth Hickson*, for that she still continued the wife of *Buxton*, the divorce from him having been obtained by collusion, and being in itself invalid for the purpose of dissolving an English marriage.

The two Petitions came on together for hearing before Vice-Chancellor *Kindersley*, who, on the 7th of December, 1865, made an order refusing the Petition of the Appellants, and directing that the funds in Court should be applied for the benefit of the Respondents (1). This was the order appealed against (2).

Sir *R. Palmer*, Q.C., Mr. *Anderson*, Q.C., and Mr. *Archibald Smith*, for the Appellants:—

The divorce in this case operated to dissolve the marriage with *Buxton*, and enabled *Shaw* and *Elizabeth Hickson* to contract a valid marriage in *Scotland*. If so, the personal *status* of husband and wife having been duly created, the children of the marriage come precisely within the words of the will, and are children "lawfully begotten." The law of *Scotland* is that which must govern this case. The parties here were *bonâ fide* domiciled in *Scotland* at

(1) *Nom. In re Wilson's Trusts* (Law Rep. 1 Eq. 247).

(2) The Lord Chancellor (Lord *Cairns*) having been counsel in the cause in the Court below, did not attend the hearing. Lord *Cranworth* presided.

the time of their marriage, and thenceforward until their death. No other law can therefore be properly applicable to them, or their children, whose place of origin and domicile is entirely Scotch: *Huber* (1); *Hertius* (2); *Story* (3). The cases of *Doe* d. *Birtwhistle* v. *Vardill* (4), and of *Don's Estate* (5), do not affect this case, for in both the question related to the effect of a subsequent marriage in legitimating previously-born children. This observation also applies to *Boyes* v. *Bedale* (6), and *Goodman* v. *Goodman* (7), where the children had been legitimated by a marriage subsequent to their birth, a fact which entirely distinguishes that case from the present. Of course, such children could not succeed to English real estate; but if by the laws of the country where they were born and their parents were married, they were expressly recognised as legitimate, that fixed on them a personal *status* which would be everywhere admitted, and they could succeed to personal estate even in *England*. [LORD CRANWORTH:—What rate of duty would such legitimated children pay under the *Succession Duties Act?*] That of children. In *Kerr* v. *Martin* (8) a woman had a child by *A.*, she afterwards married *B.*, by whom she had children; *B.* died, and she married *A.* The Scotch law recognised the rights of all these children as equal. That shews the principle on which the Scotch law confers the *status* of legitimacy. If the children there were entitled to that *status*, *à fortiori* are these Appellants entitled to it, and that *status* attached itself on their persons everywhere.

The real question here is, whether any other but Scotch law can be applicable to the case? That question must be answered in the negative. *Edmonstone's Case* (9) asserted the right of the Scotch Courts to dissolve an English marriage if the adultery was committed there; but for the process of the divorce the Defender must be residing in *Scotland*. The case of *Warrender* v. *Warrender* (10) shews distinctly that where the domicile is Scotch the jurisdiction of the Scotch law is complete. That case related to a marriage

(1) De Jur. Civ. l. 3, s. 4.
(2) Page 175.
(3) Confl. of Laws, s. 105.
(4) 7 Cl. & F. 895.
(5) 4 Drew. 194.
(6) 1 H. & M. 798.
(7) 3 Giff. 643.
(8) 2 Dunl. & Bell, Cas. in the Court of Session, 753.
(9) 19 Fac. Coll. 139, 1 June, 1816.
(10) 2 Cl. & F. 488; 2 Sh. & M. 222.

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which had, in fact, been celebrated in an English church and according to English forms; but the lawful domicile of the husband being Scotch, the Courts of *Scotland* were held to have jurisdiction over the marriage, so as to be entitled to entertain a suit for divorce. *Munro* v. *Munro* (1) is an illustration of the application of the same principle under similar circumstances, though there the object was to legitimate a child born, in fact, in *England*. And in *Rose* v. *Ross* (2) Lord *Lyndhurst* expressed an opinion which Lord Chancellor *Cottenham*, in *Munro* v. *Munro* (3), described as proving that "not the place of the marriage, but the domicile of the parties married regulates the civil consequences of the marriage."

There is no pretence to set up an alleged collusion against the lawfulness of the divorce in this case. In the first place, collusion is in fact denied; the question of jurisdiction was raised on the face of the defences, and all that the parties did was to put themselves in a position to have the case tried by a Court of competent jurisdiction. There is no illegality nor impropriety in that. In the next, it is clear that collusion does not exist where the offence has been really committed, and the only arrangement between the parties has for its object to prevent the injured party from being debarred of redress: *Erskine's* Institutes (4). It has been held in the Court of Chancery, *Perry* v. *Meddowcroft* (5), that an agreement to pay the costs of the unsuccessful party, the non-examination of some witnesses, and the non-cross-examination of others, and matters of that sort, did not of themselves constitute collusion. In *Utterton* v. *Tewsh* (6), Lord *Meadowbank* spoke of the collusion which alone was sufficient to vitiate a title to sue, as that "where the Pursuer has rendered herself participant of the wrong she complains of, by instigating it, or connivance with the perpetration of it, for the sake of the remedy or some bye purpose." That, certainly, was not the case here. And to the same effect is the opinion which the present Lord *Colonsay*, who, when Lord Advocate, gave, in his evidence before the Divorce Commissioners, that, "If a just cause of divorce exists without collusion," the consent of the other party to the obtaining of the divorce would not be

(1) 7 Cl. & F. 842; 1 Rob. 492.
(2) 4 Wils. & Sh. 289.
(3) 7 Cl. & F. 875.
(4) Bk. i. tit. vi. s. 45.
(5) 10 Beav. 122.
(6) Ferguson, Rep. p. 64.

collusion. And a similar opinion was expressed by Vice-Chancellor *Leach*, in *Donegal* v. *Donegal* (1). In *Crewe* v. *Crewe* (2) Lord *Stowell* restricted collusion to the agreeing to commit the act of adultery for the purpose of a suit, and did not extend it to a mutual willingness to advance the remedy. [LORD WESTBURY :— Your argument is, that where all the elements of a judicial decision *bonâ fide* exist, no objection arises to the judgment because it has been sought by the mutual consent of the two parties ?] It is so. And by the law of *Scotland* collusion of this sort, though it may be urged as an objection before a decree, is none after it. *Erskine* (3), and *Fraser* (4), shew that the Scotch law will not assume collusion to exist if there is a just and reasonable ground to claim a divorce for adultery, for the commission of that offence proves that the whole object of marriage is frustrated. The Vice-Chancellor was in error here, when he asserted that no Court whatever could at that time dissolve an English marriage. *Story* doubts, if he does not actually deny, such a doctrine (5), and Mr. Chancellor *Kent* (6) also doubts it, and says it would not be recognised as between the different States of the Union. And Lord *Brougham*, in *Munro* v. *Munro* (7), intimated an opinion to the same effect. Into whatever country the parties went to reside the Courts of that country would apply its own laws, without regard to the question where the marriage was contracted. That was the rule on which the English Courts had themselves acted as to foreign marriages: *Shelford* on Marriage (8); *Morse* v. *Morse* (9); *Donegal* v. *Donegal* (1); *Harford* v. *Morris* (10). The *lex loci contractûs* is not the rule which governs a case like the present, so as to prevent the remedy which the justice of the case requires. *Lolley's Case* (11) is the only one which appears to lay down that principle, and in principle that case cannot be supported. Lord *Brougham*, in *Warrender* v. *Warrender* (12), seemed to question it. There the domicile of origin of the wife was English, but that of the husband was Scotch; the marriage, in fact, took place in *England*, but the

(1) 3 Phill. Ecc. Rep. 599.
(2) 3 Hag. Ecc. Cas. 130.
(3) 1 Inst. 164.
(4) Pers. & Domestic Relations, 701.
(5) Confl. of Laws, s. 88.
(6) Comm. 85.
(7) 7 Cl. & F. 887.
(8) Page 486.
(9) 2 Hag. Ecc. Cas. 610.
(10) 2 Hag. Cons. Rep. 423.
(11) Russ. & Ry. 237; 2 Cl. & F. 567.
(12) 2 Cl. & F. 546.

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Scotch Courts were held entitled to entertain a suit for divorce. *Pitt* v. *Pitt* (1) was the converse of that case, and, as Lord *Kingsdown* there said, if the Scotch domicile was established, the jurisdiction might be maintained. *Birtwhistle* v. *Vardill* (2) does not affect this case. The son there could not succeed to English estates because of the peculiarity of the laws governing inheritance of real property here. The son was an *ante natus*, and, on the ground that he was so, being only legitimated by a subsequent marriage of his parents, it was held that he could not succeed to the inheritance of lands in *England*. Here that difficulty does not exist; the Appellants were all born after marriage duly celebrated, and their legitimacy being in that respect unquestionable, they are entitled to succeed. *Don's Estate Case* (3) merely worked out the principle of *Birtwhistle* v. *Vardill*. As in the *Vardill Case*, because he was an *ante natus*, the son could not be heir to the father, so, for the same reason in *Don's Case*, the father could not be heir to the son. In *Rose* v. *Ross* (4) the quality of legitimacy was not impressed on the children; the parties, being really domiciled in *England*, went to *Scotland* to be married, but immediately afterwards returned to *England*, where they really lived; the marriage was held not to legitimatize the children. On the other hand, in *Munro* v. *Munro* (5), though the marriage took place in *England*, the real domicile being, as it was here, Scotch, the legitimation was held to be entirely established. *Dalhousie* v. *McDouall* (6) is exactly to the same effect. *Lolley's Case* (7), when properly considered, is not adverse to the Appellant. There the domicile was English; the parties, both of whom were English, went to *Scotland* to get a Scotch divorce, and then came to *England*, solemnized another marriage, and resumed the English residence; so that both marriages were, in fact, English throughout, and were made with a view to English domicile. Here the second marriage was Scotch, and the domicile and all the objects of the marriage were Scotch also. Assuming, therefore, which is not admitted, that *Lolley's Case* is unimpeachable, the facts of the two are entirely different.

(1) 4 Macq. Sc. Ap. Cas. 627.
(2) 7 Cl. & F. 895.
(3) 4 Drew. 197.
(4) 4 Wils. & Sh. 289.
(5) 7 Cl. & F. 842.
(6) 7 Ibid. 817.
(7) Fac. Coll. 20 March, 1812; Russ. & Ry. Cr. Cas. 237; 2 Cl. & F. 567.

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A marriage honestly intended and duly celebrated after a divorce which is believed to be valid, though it ultimately proves to be insufficient, will confer legitimacy on the children. In such a case the rule stated by *Sanchez* (1), "*Quando proles quae nil mali gessit, jure optimo, ratione bonae fidei alterius parentis, sit plene legitima, juraque omnia legitimae prolis sortiatur.*" *Ferraris* (2) is to the same effect. And the Scotch authorities collected in the *Liber Officialis* (3), in *Bell* (4), and in *Fraser* (5), fully sustain the doctrine.

The Scotch Courts have title to pronounce a divorce *à vinculo*. The English Courts, according to *Salkeld* (6), could once do so, for which he refers to *Glanville*, 44, *Bracton*, 92, and the Year Book, 18 Edw. 4, c. 45, though he adds that "in *Foljambe's Case, anno* 44 Eliz., in the Star Chamber, that opinion was changed, and the Archbishop *Bancroft*, upon the advice of divines, held that adultery was only a cause of divorce *à mensa et thoro*." And Lord *Brougham*, in *Warrender* v. *Warrender* (7), intimates his opinion that "Between the Reformation and the latter end of Queen *Elizabeth's* reign it was held that the consistorial jurisdiction extended to dissolve marriages *à vinculo* for adultery," for which he refers to *Burn* (8). Here, too, though the contract originated in one country, the remedy upon it was rightly applied in another, by the laws and practice of which the rights of the parties who were there actually domiciled, were properly regulated: *Talleyrand* v. *Boulanger* (9). *Don* v. *Lippman* (10) expressly declares that though a contract may be entered into in one country, the forms of law in another country, where it is to be enforced, are those which must regulate its enforcement.

Mr. *Coleridge*, Q.C. (with whom was Mr. *G. N. Colt*), for the executors and trustees, and the legatees under the will:—

The simple question is, whether a Scotch divorce of an English marriage can be recognised as conclusive in this country. The

(1) De Matr. Bk. 8; Disp. xxxiv. tit. vi. s. 46, p. 162
(2) Jus. Can. vol. iv. p. 48.
(3) Cases, 116, 117, 121.
(4) Bell, Putative Marriage.
(5) Law of Par. & Child, p. 23.
(6) 3 Salk. 138.
(7) 2 Cl. & F. 553.
(8) Ecc. Law, tit. "Marriage," xi. "Divorce."
(9) 3 Ves. 447.
(10) 5 Cl. & F. 1.

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children of the subsequent Scotch marriage may be legitimate in *Scotland*, but they are not legitimate here. It is admitted that the Scotch Courts have often claimed this jurisdiction, but it has never been allowed in *England*, and the claim was expressly overruled in this House in *Pitt* v. *Pitt* (1). That case fully established what had before been intimated in *Dolphin* v. *Robins* (2), that a foreign residence, and, most certainly, if it was not the permanent domicile of both parties, was not sufficient to found the right to pronounce a divorce of an English marriage. What is true of divorce is equally true of marriage. A marriage though taking place abroad, where the English persons happen to be at the time, will not be a valid marriage if by the law of this country it is forbidden: *Brook* v. *Brook* (3). That was the condition of things when the ceremony of the union of Mr. *Shaw* and Mrs. *Buxton* took place. She was then, by the law of *England*, the wife of another man, and could not lawfully be married to Mr. *Shaw*.

It is denied that a Scotch Court can pronounce a valid divorce of an English marriage, but even if it could, the divorce here was in itself invalid; it was not *bonâ fide* obtained. There must be a real Plaintiff and a real Defendant: *Shedden* v. *Patrick* (4); a real suit, and a real matter for judgment, otherwise, as Lord *Brougham* there said (5), the judgment, though affirmed by this House itself, would go for nothing. [LORD CRANWORTH:—What do you say to the rule of Scotch law, that though a divorce may be obtained by collusion, the children born of a duly celebrated marriage following upon it will be legitimate?] First, that that cannot be so, for collusion between parties seeking a judgment prevents, by reason of the fraud, the judgment from being valid; next, that a judgment may be valid in the country where it is pronounced, and yet be of no value elsewhere. There was no Scotch domicile here; it was a mere temporary residence for the purpose of the suit, and therefore *Lolley's Case* (6) is, for such a purpose, decisive. *Simonin* v. *Mallac* (7) and *Dolphin* v. *Robins* (2) fully establish this latter proposition. [LORD COLONSAY:—Do you put your argument on

(1) 4 Macq. Sc. Ap. 627.
(2) 7 H. L. C. 390.
(3) 9 Ibid. 193.
(4) 1 Macq. Sc. Ap. 535.
(5) 1 Macq. Sc. Ap. 619.
(6) Russ. & Ry. 237; 2 Cl. & F. 567.
(7) 2 Sw. & Tr. 67.

the broad ground that an English marriage cannot be dissolved anywhere?] For English purposes it cannot; at all events it cannot where there is not at the time a real domicile in the foreign jurisdiction.

Mr. *Jessel*, Q.C. (with whom was Mr. *W. W. Mackeson*, Q.C.), for the devisee in remainder:—

In order to take the real estate the claimant must shew himself to be strictly, according to the rules of the English law, the son of *Elizabeth Hickson* "lawfully begotten." The decision in the Court below was obtained by collusion, not criminal collusion, but collusion such as to affect the validity of the judgment. But, without relying on collusion, it is plain that no nation submits to be bound by the judgments of the Courts of other nations, except so far as they do not in any way conflict with its own. This doctrine is strongly declared by *Huber* in his three celebrated maxims (1), and is expressly adopted by *Story*, who says (2): "Whatever force and obligation the laws of one country have in another depend solely on the laws and municipal regulations of the latter" (s. 23); "No nation can be justly required to yield up its own fundamental policy and institutions in favour of those of another nation" (s. 25). He asserts that it is the "right and duty of every nation to refuse its aid to carry into effect any foreign laws which are repugnant to its own interests and polity" (s. 31). "It is difficult to conceive upon what ground a claim can be rested to give to any municipal laws an extra-territorial effect when those laws are prejudicial to the rights of other nations, or to those of their subjects" (s. 32). "Of the nature, extent, and utility of this recognition of foreign laws respecting the state and condition of persons, every nation must judge for itself, and certainly is not bound to recognise them when they would be prejudicial to its

(1) 2 Huberus, Lib. i. tit. 3, s. 2. "*De Confl. Leg.* (1.) *Leges cujusque imperii vim habent intra terminos ejusdem reipublicae, omnesque ei subjectos obligant, nec ultra.* (2.) *Pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur.* (3.) *Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.*"

(2) Confl. of Laws, ch. ii.

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own interests" (s. 36). These principles have often been acted on in the American Courts. The *Inhabitants of Hanover* v. *Turner* (1), *Jackson* v. *Jackson* (2), *Dorsey* v. *Dorsey* (3), *Harding* v. *Alden* (4), *Harteau* v. *Harteau* (5), are all American cases, in which one state refused to recognise a divorce pronounced in another state, with relation to a marriage celebrated in itself between its own citizens, where the laws of the two states were different, and where there had not been perfect *bona fides* in the suit. The law of the *United States* and of *England* is the same in this respect. And *Burge*, speaking of the subjects of one state passing into another to obtain sentences and decisions which they desire, says (6) that "it is not compatible with the respect which states owe and render to the laws of each other that the tribunals of one should afford assistance to the subject of another state in withdrawing himself from the operation of a law which is obligatory on him." That was done in this case, and the judgment is therefore not binding here. [He stated at full length and commented on the facts relating to this point.]

In *Lolley's Case* (7) the judgment of divorce pronounced in *Scotland* was not valid to protect *Lolley* against the penalty of bigamy, because when he obtained it he was not really domiciled in *Scotland;* and Lord *Brougham*, in *Warrender* v. *Warrender* (8), expressly refers to the want of *bona fides* in the suit as affecting the validity of the judgment. The same view of that matter was taken by Dr. *Lushington* in *Conway* v. *Beazley* (9). *Geils* v. *Geils* (10) was likewise a case of evading the law of *England;* and in *Dolphin* v. *Robins* (11) the judgment of divorce was held to be entirely ineffectual, and one of the reasons for the decision was, that collusion had been practised in obtaining it, though the strongest and most peremptory of all was, that the Scotch divorce thus founded on a foreign and temporary domicile could not be recognised here. *Tollemache* v. *Tollemache* (12) is to a similar effect.

The doctrine, that if the parents act in ignorance the children

(1) 14 Mass. Rep. 227.
(2) 1 Johnst. 424.
(3) 7 Watts (Penns.) Rep. 349.
(4) 9 Greenl. 140.
(5) 14 Pickering, 181.
(6) 1 Col. & For. Law, 690.
(7) Russ. & Ry. 237; 2 Cl. & F. 567.
(8) 2 Cl. & F. 529.
(9) 3 Hag. Ecc. Rep. 639.
(10) 1 Macq. Sc. Ap. 262.
(11) 7 H. L. C. 390.
(12) 2 L. T. (N.S.) 87.

may be legitimate, is one found in the Canon Law: *Hertius* (1); *Boehmer* (2). *Erskine* (3) so speaks of it, but does not assert that it is the law of *Scotland;* on the contrary, he there quotes an opinion of *Craig* (4) to shew that that is very doubtful. But, even assuming it now to be a recognised doctrine of the law there, it was ignorance of fact as well as of law which could alone have this effect, and all that it did was to capacitate the children to succeed to certain offices, but not to confer on them a title to the possession of the putative father's property. For in another part *Erskine* (5) says, that as to the legal rights of succession, rights founded on marriage, they are obtained by those alone who are born in lawful marriage. And in *Bell's* Principles (6) there are many cases collected which really apply to all the points in this case, and shew that this divorce could not dissolve the English marriage, and give the character of "lawfully begotten children" to the offspring of the subsequent union.

Sir *R. Palmer*, in reply, insisted that there was no fraudulent collusion here; the husband merely consented to do what would enable his wife to get justice. That was not infringing any moral obligation or practising any deceit on the Court. [LORD CHELMSFORD:—But the Court may put to the party "the oath of calumny," as it is called in *Scotland*, in which he has to swear that he does not know of any concert or agreement to obtain such divorce. If the Court had known of this agreement, would it not have treated the agreement as fully within the words of the oath.] It could not be material, for the facts on which the judgment was founded were undoubted. [LORD CHELMSFORD asked whether the Scotch Court would not deem it material?] There was no fraud practised on the Court. There was a real cause of suit, a real Plaintiff, a real Defendant, and a real ground for judgment, so that all the conditions mentioned by Lord *Brougham* in *Shedden* v. *Patrick* (7) as requisite to constitute a valid judgment, existed here. The marriage with *Shaw* was a Scotch marriage with a real Scotch

(1) De Matr. s. 17.
(2) Bk. iv. tit. 17, par. 34.
(3) Inst. Bk. i. tit. 6, par. 51.
(4) Bk. ii. Di. 18, s. 18.
(5) Inst. Bk. iii. tit. 10, ss. 5, 6.
(6) Sect. 1537.
(7) 1 Macq. Sc. Ap. 535.

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domicile, and, being in itself perfectly valid, it conferred complete legitimacy on the children.

May 7. LORD CRANWORTH:—

My Lords, the question to be decided in this case is one of a class which not unfrequently gives rise to great difficulties—the question, namely, how far the *status* of legitimacy or illegitimacy attaching on a subject of this country may or ought to be modified by the laws of another country.

There is no dispute as to the facts material for the decision of this case:—[His Lordship stated them.] The trustees, after the death of *Elizabeth Hickson*, paid the money into the Court of Chancery under the *Trustee Relief Act;* and the question now to be decided is, whether these children of *Elizabeth Hickson* by *John Shaw* are entitled to the fund as children of the testator's great-niece; or whether they are to be treated as illegitimate children, so that the fund will go over to other persons designated in the event of there being no child of the great-niece. Vice-Chancellor *Kindersley* decided that they were not so entitled. They have appealed from his decision, and the matter now remains to be determined by your Lordships.

If the law of *Scotland* on the subject of marriage and divorce was the same as that of *England*, the case would not have admitted of doubt. As *Elizabeth Hickson* was married to *Thomas Buxton* in 1828, and as she gave birth to three children during his lifetime, those children must, by the law of *England*, supposing that law alone to be in question, either be his children or be bastards. The former conclusion is that which in bygone days would possibly have been adopted, so reluctant were the Courts to receive any evidence of non-access by the husband while he was *intra quatuor maria*. Adopting, however, the more reasonable views on this subject by which the Courts of this country are now guided, we may safely act on the hypothesis adopted by all parties in the argument of the case, that the children of *Elizabeth* are either her lawful children by *John Shaw*, or are illegitimate. That they are illegitimate, if we are to look only to the laws of *England*, is certain; for *ex hypothesi* they are not the children of *Buxton*, who was the husband of *Elizabeth* when they were born. This, there-

fore, brings us to consider whether, in order to help us in deciding this question, we are warranted in looking at any other law than that of *England*—whether we may to any extent be guided by the law of *Scotland*.

If the parties in this case had been Scotch, and not English, and if all which occurred had occurred not in *England* but in *Scotland*, there would, I presume, have been no question on the subject. If *Thomas Buxton*, being a domiciled Scotchman, had married in *Edinburgh*, *Elizabeth Hickson*, being a domiciled Scotchwoman, and afterwards, while their Scotch domicile continued, she had obtained a decree of divorce in the Court of Session, and then had married *John Shaw*, the issue of that marriage would certainly have been legitimate. The argument of the Appellants is, that the consequence must be the same, though the parties were at the time of the first marriage domiciled in *England*, and were married there. The question, it is contended, is, whether, when the second marriage was contracted, the parties to it had the capacity to contract marriage; in other words, whether the effect of the divorce was to enable them to enter into a valid contract of marriage, which, but for the divorce, they certainly could not have entered into. The whole, therefore, turns on the validity of the divorce. Now, the law of *Scotland* seems clear that a residence in *Scotland* for forty days makes that country the *domicilium fori* of any person so residing in the country, in which, for the purposes of litigation, he is to be treated as being domiciled. And it is asssumed that this is true whatever be the nature of the litigation; that it holds equally in cases the decision in which may involve the personal *status* of those who may claim through the litigant parties; as also where it is a mere dispute between the litigant parties themselves. Taking this, however, to be the undoubted law of *Scotland*, the question is, whether that principle is one which this country is bound to recognise. I think it is not.

The facts of this case do not raise the question as to what would have been the *status* of these children if *Buxton* and *Elizabeth Hickson*, though married at *Manchester*, had always been Scotch persons, and had always lived in *Scotland;* or even what it would have been if, before the proceedings for the divorce, *Buxton* had actually *bonâ fide* quitted *England* permanently, and established

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5 PD 153
14 CLD 621
17 CLD 285
294

himself in *Scotland*, so as to have acquired a Scotch domicile for all intents and purposes. It may be that in these circumstances the Courts of this country would recognise the *status* of these children, so as to entitle them, after the death of their mother, to the fund given to her children; which, no doubt, must be construed as meaning her legitimate children. But on that point I express no opinion. The decision in *Doe* v. *Vardill*, though the case did not turn on any question depending on the validity of a divorce, yet rests on principles hardly, to my mind, distinguishable from it; and it may certainly be assumed that these children could not, in any circumstances, claim real estate in *England* by descent. But the opinions of the Judges in that case, and of the noble Lords who spoke in the House, left untouched the question of legitimacy, except so far as it was connected with succession to real estate. I think they inclined to the opinion that for purposes other than succession to real estate, for purposes unaffected by the *Statute of Merton*, the law of the domicile would decide the question of *status*. No such decision was come to, for no question arose except in relation to heirship to real estate. But the opinions given in the case seem to me to shew a strong bias towards the doctrine that the question of *status* must, for all purposes unaffected by the feudal law, as adopted and acted on in this country, be decided by the law of the domicile. Even, however, if that had been expressly so decided, it would not affect this case. The domicile to produce that result must be a *bonâ fide* domicile for all purposes, not, that which alone existed in this case, a mere residence of forty days, so as to give jurisdiction to the Scotch Courts.

The important differences on the subject of marriage and divorce which exist in the different parts of the *United Kingdom* often give rise to perplexing difficulties, and exhibit a state of our law little creditable to us. But these difficulties make it more than usually incumbent on those who have to administer the law to take care that wherever a clear line has been drawn by judicial decision the course which it has marked out should be rigidly followed. Now, whatever be the difficulties in such cases as the present, I think the doctrine that no divorce in *Scotland* resting merely on a *forum domicilii*, had, at all events before the passing

of our English *Divorce Act* in 1857, any effect in *England* on the validity of an English marriage, is established on the highest authority.

It is impossible to have a stronger authority for this than the case of *Lolley* (1), for it was decided there by the twelve Judges that by the second marriage he was guilty of bigamy, though on general principles every leaning in a criminal case would be in favour of the party accused.

That case was followed by Dr. *Lushington* in *Conway* v. *Beazley* (2). There, as in the present case, the second marriage was had in *Scotland*, not, as in *Lolley's Case*, in *England;* and it was attempted on that ground to distinguish the two cases. But Dr. *Lushington* held that the principle was the same wherever the second marriage was solemnized, for that as neither of the parties to the first marriage had been, at any time, *bonâ fide* domiciled in *Scotland* the principle of *Lolley's Case* must prevail.

The same question arose in this House in 1859, in *Dolphin* v *Robins* (3). The case was very fully considered, and the conclusion at which your Lordships arrived unanimously was, that the Scotch Courts have no power to dissolve an English marriage where the parties are not really domiciled in *Scotland*, but have only gone there for such a time as, according to the doctrine of the Scotch Courts, gives them jurisdiction in the matter.

These cases clearly decide the one now before the House, for if the first marriage here was not dissolved there could not have been a second marriage. Till the first was dissolved there was no capacity to contract a second. If after the second marriage *Buxton* and *Elizabeth* had again cohabited, and there had been issue, that issue would certainly have been legitimate by the law of *England*, and it cannot be argued that the issue of both unions could share together.

The view which I take of this case relieves me from the necessity of considering whether the resort to *Scotland* for the purpose of the divorce, and the arrangements made among the parties for bringing about that object, were or were not of such a character as to taint the whole of the proceedings with fraud; I am not at

(1) Russ. & Ry. 237; 2 Cl. & F. 567. (2) 3 Hag. Ecc. Rep. 639.
(3) 7 H. L. C. 390.

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all satisfied that they were, but I am glad to be relieved from the necessity of deciding on such a ground.

There is only one farther observation which I desire to make; it is this: In saying that the Scotch Courts have no power to dissolve an English marriage where the parties have only gone to *Scotland* for the purpose of obtaining there a *domicilium fori*, I do not mean to express any opinion as to what might be the effect of a divorce so obtained considered merely as a Scotch question. In the anomalous state of our laws relating to marriage and divorce, it may be that such a proceeding may be valid to the north of the *Tweed*, but invalid to the south. And I am painfully sensible of the inconveniences which may result from such a state of the law. But it must be for the Legislature to set it right. The authorities seem to me to shew clearly that whatever may be the just decision of the Scotch Courts in such a case as the present, on this subject of divorce according to Scotch Law, it is one in which this country cannot admit any right in them to interfere with the inviolability of an English marriage, or with any of its incidents. To do so would be to allow a prejudice to English law to be created by the decisions of what, for this purpose, we must call a foreign law, thus going beyond what, in the passage cited from *Huber* (1), any country is called on to do.

On these short grounds I am of opinion that there was no foundation for this appeal, and I move your Lordships that it may be dismissed.

LORD CHELMSFORD:—

My Lords, the question raised by this appeal is, whether the Appellants are entitled, under a devise and bequest in the will of *John Wilson*, made in *England* on the 27th of February, 1832, of the produce of real estate "to the first and other sons lawfully begotten" of their mother, described as the testator's great niece, and of his personal estate to her "children."

Whether the Appellants answer the descriptions respectively of "son lawfully begotten," and of "children," depends upon whether their parents were lawfully married; and this again depends upon

(1) Bk. i. tit. 3, s. 2, De Confl. Leg.

the effect of a divorce in *Scotland* dissolving the marriage of their mother with *Thomas Buxton* in *England*.

This marriage of the Appellants' mother with *Buxton*, though procured by his fraud, for which he afterwards suffered punishment, and though never consummated, was still a valid marriage, and at the period when it took place was indissoluble except by Act of Parliament. The husband and wife always lived separate, and for some years under a deed of separation. *Buxton*, during a part of the time, carried on an adulterous intercourse with another woman, in the county of *Derby*. Mrs. *Buxton*, who resided with her mother in the same county, became acquainted with the Appellants' father, *John Shaw*, who paid his addresses to her with a view to marriage and was favourably received. The existing marriage with *Buxton* was, of course, an impediment to their union, and it was necessary that it should be removed out of the way. For this purpose negotiations were opened with *Buxton*, who ultimately undertook to be bound by any terms to which a friend of his named *Cantrell* should agree. Accordingly, on the 14th of November, 1844, an agreement was entered into between *Cantrell* and *Shaw*, the Appellants' father, that *Buxton* should go to *Scotland* for the purpose of placing himself within the jurisdiction of the Scotch Courts, the memorandum of agreement expressing that he shall be paid "£40 for his expenses in *Scotland* during his journey there to collect agricultural information, pursuant to his agreement with Mr. *Bull*," and "that in case *Buxton* be divorced from his wife he be paid £250 at a certain period, with interest to that time, provided that in case *Buxton* shall, either by himself or by any one through him, give information which shall be prejudicial to the divorce, the £250 shall be forfeited, with all interest thereon." On the following day, the 15th of November, *Shaw* entered into an undertaking that within one month from the period when the divorce should be obtained, the Appellants' mother should sign an authority to the trustees under the deed of separation to pay *Buxton* the sum of £900, then in their hands.

Upon this arrangement *Buxton* went to *Scotland*, and after he had been there a sufficient time to give the Scotch Courts jurisdiction over him (viz., forty days), a summons of divorce at the instance of his wife was issued against him, grounded upon the

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adultery which he had committed in *England*. *Buxton* put in defences to the summons, alleging that he and his wife were natives of *England*, and that the marriage took place at *Manchester*, and that although he had resided in *Scotland* more than forty days the proper domicile of the parties was in *England;* and he pleaded that the Court had no jurisdiction to pronounce a decree of divorce. The Lord Ordinary, by an interlocutor of the 4th of February, 1846, repelled the defence of want of jurisdiction, and on the 20th of March, 1846, found the Defender guilty of adultery, and pronounced sentence of divorce.

On the 17th of June, 1846, the parents of the Appellants were married in *Edinburgh* in *facie ecclesiæ*, after the publication of banns. *Shaw* was at that time studying in *Edinburgh* with a view to becoming an advocate, and shortly after his marriage he was called to the Scotch bar, and continued to practise in *Scotland* till his death in 1852. The Appellants were all born in *Edinburgh* after this marriage.

Vice-Chancellor *Kindersley*, in giving his judgment against the validity of the marriage, said, "that to assert the validity of the Scotch divorce, upon which alone the validity of the marriage with *Shaw* depends, is to assert that the Court of Session is not bound by the principle of international law; that all questions as to the validity, or incidents, or consequences of a marriage, are to be decided according to the *lex loci contractûs, i.e.*, the law of the country where it was solemnized."

But in a suit for a divorce the validity of the marriage is not in question, and the violation of the marriage contract can hardly be called one of the "incidents" or "consequences" of it. If a divorce is to be regarded as a remedy for the breach of the matrimonial contract, it is a general principle of international law that all remedies depend upon the *lex fori*, and not on the *lex loci contractûs*.

The Vice-Chancellor, also, thought it to have been solemnly decided in *Lolley's Case* (1), that "the law of this country did not recognise the right or authority of any Court, whether domestic or foreign, to dissolve an English marriage for any cause or upon any pretext whatever; and that any decree, or judgment, or sen-

(1) Russ. & Ry. 237; 2 Cl. & F. 567.

tence of any foreign Court purporting to dissolve such marriage was to be treated as a mere nullity." In this view of the decision in *Lolley's Case* the Vice-Chancellor is supported by the opinion of Lord *Eldon* in *Tovey* v. *Lindsay* (1), where he said: "The twelve Judges of *England* have lately unanimously decided that an English marriage could not be anywhere" (which seems to be a misprint for "otherwise") "dissolved except by an Act of the Legislature."

It does not appear to me that *Lolley's Case* can be regarded as an authority for so extensive a proposition. I cannot help joining in the doubt expressed by Dr. *Lushington*, in *Conway* v. *Beazley*, "whether it was the intention of the Judges to decide a principle of universal operation absolutely, and without reference to circumstances, or whether they must not, almost of necessity, be presumed to have confined themselves to the particular circumstances that were then under consideration."

Lolley's Case is very briefly reported, but there is little doubt that *Lolley* went to *Scotland* for no other purpose than to enable his wife to be divorced from him; for it is stated as a fact in the case, that "the second wife agreed to marry him if he could obtain a divorce." In the case of these Appellants, it is said: "It would be enough to distinguish *Lolley's Case* from the present to say, that the second marriage was entered into by *Lolley*, the divorced husband, in *England*, and that it was with a view to the English marriage that he went to *Scotland*, from which he appears to have returned and married again, immediately after he got the divorce." But it must have been quite immaterial to the question of the validity of the Scotch divorce, where *Lolley* was afterwards married, or whether he was married at all. The only consequence of the second marriage being in *England* was, that it brought *Lolley* within the jurisdiction of the English Criminal Court. If he had married in *Scotland*, and thereby committed bigamy in the eye of the English law, he could not have been tried here, as the offence would have been committed out of the jurisdiction; and if he had been prosecuted in *Scotland*, the Courts there would have held that he had been guilty of no crime, as the first marriage, in their opinion, would have been legally dissolved.

(1) 1 Dow. 136.

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1 P. D. 145. 6 P. D. 42

I think that *Lolley's Case* cannot be pressed as an authority beyond this extent, that the Scotch Court has no power to dissolve an English marriage where the parties are not domiciled in *Scotland*, but have only gone there for such a time as would render them amenable to the jurisdiction of the Scotch Courts. It certainly did not decide (as the Vice-Chancellor supposed), nor has any other case decided, "that the law of this country did not recognise the right or authority of any Court, whether domestic or foreign, to dissolve an English marriage for any cause or upon any pretext whatever." On the contrary, the decision in *Warrender* v. *Warrender* appears to me to be a direct authority in support of the exercise of such a jurisdiction by the Scotch Courts. It was not because in that case the husband's domicile was Scotch at the time of the English marriage, that the Court assumed the jurisdiction which was upheld by the House of Lords, but on account of the Scotch domicile which he had at the time he raised the action of divorce against his wife, which attracted her domicile, and brought her constructively within the jurisdiction. There can be no distinction in principle, as to the power of the Scotch Court to dissolve an English marriage, between the case of a domicile existing at the time of such marriage, and a permanent domicile afterwards acquired.

A question of greater difficulty, which has been argued in this case is: What is the effect of a Scotch divorce upon an English marriage, where the married parties do not afterwards become domiciled in *Scotland*, nor have resorted thither with the design of invoking the jurisdiction of the Court, but where, happening to be in the country, one of them applies for and obtains a decree of divorce?

Since the decision in *Lolley's Case* the Courts of *Scotland* have from time to time asserted and exercised a jurisdiction to dissolve marriages which have taken place in *England*, and elsewhere than in *Scotland*, where the parties to them had acquired no permanent domicile in that country, but had merely continued there a sufficient time to give the Courts jurisdiction. These cases have never been appealed to this House, so as to raise the question of the validity of such divorces in a form to require your Lordships to decide upon the existence of the jurisdiction according to the

principles of Scotch law. I cannot, therefore, subscribe to the opinion expressed by my noble and learned friend, Lord *Cranworth*, in *Dolphin* v. *Robins*, "That it must be taken now as clearly established that the Scotch Court has no power to dissolve an English marriage where the parties are not really domiciled in *Scotland*."

But whatever opinion may be ultimately entertained as to the extent of the power of the Scotch Courts to dissolve English marriages, the validity of the divorce of the Appellants' mother from *Buxton* cannot be admitted, if it was obtained by concert or collusion. It was argued for the Appellants that the only collusion which can affect the validity of a divorce is where there are concert and connivance in the acts upon which the decree proceeds, and that if a just cause of divorce exists without collusion, any arrangement to bring the facts before a Court of competent jurisdiction, however purchased or obtained, is unobjectionable. I quite agree that if the agreement in this case had been that *Buxton* should bring himself within the reach of the Scotch Court, so as to enable his wife to institute a suit for a divorce, to be determined upon the merits, although it was stipulated that he was to receive a sum of money when the divorce was obtained, this would not amount to collusion. But the arrangement between the parties was of a different character. In order to make it possible for the contemplated marriage between the father and mother of the Appellants to take place, the previous dissolution of the marriage with *Buxton* was absolutely necessary. *Shaw*, therefore, who was intent upon attaining his object, stipulated that *Buxton* should be paid a sum of money in case he was divorced, and restrained him from attempting to defeat the proceedings by imposing upon him the forfeiture of the money in case he should "by himself, or by any one through him, give information which should be prejudicial to the divorce." Such an agreement as this appears to me to come within the very words of the oath *de calumniâ*, which was required to be taken by Mrs. *Buxton*, by which she swore "that there had been no concert or collusion between her and the Defender, or her friends or agents, in raising the action in order to obtain a divorce against him, nor did she know, believe, or suspect, that there had been any concert or agreement between any other person on her behalf, and the

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said Defender or any other person on his behalf, with the view or for the purpose of obtaining such divorce." It is impossible to doubt that the disclosure to the Court of the agreement between the parties upon which the action was raised, might have been prejudicial to the divorce, and *Buxton* would have run the risk of forfeiting the money he was to receive if he had given information about it.

I do not think much of the proof of *bona fides* which the Appellants' counsel founded upon *Buxton's* plea to the jurisdiction of the Court. It was necessary that the parties should be sure of their ground, and that they should be satisfied of the competency of the Scotch Court to pronounce a decree of divorce, upon the legality of which the validity of their intended marriage entirely depended. It was in furtherance therefore, and not in opposition to the proceedings, that the defence of want of jurisdiction was offered; because if it had been well founded, it would have proved that the impediment to the marriage of the parents of the Appellants could not be removed, and that all hope of it must be abandoned.

It is possible that the Scotch Courts might not have entertained the same view of the question of collusion which I have formed. But even if they had, it appears from the evidence of the Scotch advocates produced in this case that, according to the law of *Scotland*, reduction of a decree of divorce upon the ground of collusion cannot be pronounced after a year and a day from the date. I suppose, therefore, that the Scotch Courts would sustain the decree of divorce, and would hold the subsequent marriage to be valid if they were brought into question before them. The counsel for the Appellants therefore contend that the decree of divorce being irreversible the marriage of the parents of the Appellants was valid, and the *status* of legitimacy of the Appellants being established in *Scotland* must be recognised everywhere.

They farther argue that, even assuming the marriage to be invalid, the Appellants might still be legitimate. They ground this argument upon the law of *Scotland*, "which" (according to the evidence of the Scotch advocates, to whom I have previously referred), "from considerations of expediency and humanity, adopted the rule of the canon law, which recognised the legiti-

macy of children born of a putative marriage—that is, a marriage regular and solemn in point of form, but null in law, because of the existence of an impediment such as the prior existing marriage of one of the parties, both or either of the parties being ignorant of the existence of the prior marriage."

The authority of text writers was referred to upon this point, all of whom confine the ignorance which renders children of a void marriage legitimate to ignorance of some fact by the parents. In the present case there was no fact bearing on the validity of the second marriage unknown to either of the parties to it. They drew their conclusions from known facts, and acted upon their own judgment as to the correctness of the advice given them upon the subject of the decree of divorce. Although they may have proceeded *bonâ fide* upon this advice, still their case is not brought within the principle of the law as laid down both by the evidence and in the text writers, as the ignorance imputed is not of fact, but of law.

But if a constructive legitimacy of this kind would, under the circumstances, have arisen in *Scotland*, I cannot think that we could be bound to recognise it so far as to qualify the offspring of a void marriage to take under the description of "children" in an English will.

My opinion in this case is founded entirely upon the peculiar circumstances attending it; the first marriage having taken place in *England* between parties having an English domicile which they never changed, and the divorce in *Scotland* having been obtained by preconcerted arrangement, the parties resorting to the Scotch Courts for the sole purpose of making it instrumental to the attainment of their objects. If this does not amount to collusion in the sense in which that term appears to have been employed in some cases of this description, I do not think that the tribunals of this country can regard a divorce thus obtained as binding on their judgment. It seems to me that this case cannot be distinguished from that of *Dolphin* v. *Robins* (1), decided by your Lordships, where the validity of a will made in *France* depended upon the effect of a Scotch divorce upon an English marriage. In that case there was an agreement between the

(1) 7 H. L. C. 390.

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married parties to procure a divorce in *Scotland*, and the husband was to receive £12,000, which was to be forfeited in case he should by false or insufficient evidence prevent the divorce being obtained (for so I interpret the ambiguous and inaccurate language of the memorandum upon that subject). It was held that a divorce procured by the execution of this preconcerted arrangement was, as Lord *Kingsdown* expressed it, "mere mockery and collusion from beginning to end."

In that case the husband was to forfeit the money he was to receive for assisting to procure the divorce "if he should prevent its being obtained by false or insufficient evidence." In the present case *Buxton* was to forfeit what he was to receive "in case he should give information prejudicial to the divorce." I think the cases exactly resemble one another.

Whatever may be the view of the Scotch Courts as to the legitimacy of the Appellants, your Lordships are called upon to determine whether they answer a particular description upon principles of English law, and by the rules of construction of an English will. It is clear that the words "son lawfully begotten" and "children" in the will in question can apply only to a legitimate son or to legitimate children, and that the Appellants, not having the character of legitimacy according to English law, cannot take under these descriptions.

The decree appealed from must be affirmed.

LORD WESTBURY:—

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My Lords, this case depends on the answer to the question, whether a marriage solemnized in *England* between two English subjects, domiciled in *England* at the time, can be dissolved by the decree of a foreign tribunal.

According to the institutions of *England* as existing at the time of the alleged divorce, no such decree could have been obtained in any Court, for no forensic tribunal existed in *England* with jurisdiction to grant divorces *à vinculo matrimonii*. The foreign decree of divorce is adduced for the purpose of determining a question touching a right of property that has arisen in an English Court of justice, and which must be decided by English law. It is therefore a question of English law, and the true in-

quiry is: Does the English law recognise and admit the finality of a foreign judgment divorcing, *à vinculo matrimonii*, English subjects who were married in *England*. The foreign decree may be perfectly valid and unimpeachable within the territorial jurisdiction of the Judge who pronounced it. It may *there* fix the legal *status* of persons and conclude the right and title to property; but it may still not be such a sentence as by the comity of nations (that is by the general principles of jurisprudence which are recognised by the Christian states of *Europe*) has an extra-territorial effect and authority.

The first essential for the validity of a foreign decree is, that it should be pronounced by a Court of competent jurisdiction between parties who are *bonâ fide* subject to that jurisprudence. In the present case two English subjects who had married in *England* being desirous of obtaining a divorce, crossed the Border into *Scotland* for the purpose of getting it. The wife sued the husband for a divorce in a Court which was competent to exercise jurisdiction for such a purpose over those who were subject to it. But could this Court, consistently with true principles, assert such jurisdiction over those who were not permanently residing within the limits of its authority? I am not looking at the simulated residence in *Scotland* with a view to holding the judgment collusive, but with reference to the question whether the Scotch Court can justly assert that by such temporary residence it acquired a jurisdiction which the Courts of another country ought to recognise and admit. It is perfectly competent to the Courts in *Scotland* to fix a certain amount of residence as the condition for the exercise of its jurisdiction, and if that condition be fulfilled, it may proceed to pronounce a judgment that will be binding within its own borders; but that judgment cannot claim extra-territorial authority unless it be pronounced in accordance with rules of international public law.

The extent and limits of the comity of nations, or of the obligation which one nation is under to receive and admit the judgments of the Courts of another country, are well defined in one of the axioms of *Huber*, who says: "*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperanti*

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ejusque civium præjudicetur." But if the Court of a foreign country permits the subjects of a bordering nation to resort to it for the purpose only of getting rid of the personal *status* and obligations of husband and wife, which release they cannot obtain in the Courts of their own country, it is plain that such foreign Court is in reality, by its tribunals, usurping the rights and functions of sovereignty over the subjects of another country who still retain, and, as soon as the purpose is answered, intend to return to their native country and resume, their original position. Can this be done without injury to the authority of such bordering power and to the rights of its subjects?

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Social rights depend in very many cases upon the personal *status* and relations of individuals; that is to say, upon the relation of husband and wife, father and child, and all the relations which are consequent upon marriage, and if these relations as they exist cannot be altered by the tribunals and domestic law of the country where they were formed, are not the institutions of that country prejudiced, and its subjects injured, by permitting a foreign Court to be invoked for the purpose of altering social rights and duties, which cannot be changed under their own laws, in their own Courts of justice.

It is true that persons commorant in a foreign country, but without any intention of remaining there, are, whilst they are so commorant subject to the laws of that country, and must yield obedience to them; but that is a very different thing from a country permitting foreigners to resort to it for the sole purpose of getting released from the most solemn of all contracts, and the most important social obligations. Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming, and, if necessary, of dissolving, the marriage contract.

No nation can be required to admit that its domiciled subjects may lawfully resort to another country for the purpose of evading the laws under which they live. When they return to the country of their domicile, bringing back with them a foreign judgment so obtained, the tribunals of the domicile are entitled, or even bound, to reject such judgment, as having no extra-territorial force or

validity. They are entitled to reject it, if pronounced by a tribunal not having competent jurisdiction; and they are *bound* to reject it, if it be an invasion of their own laws and polity.

But this right to reject a foreign sentence of divorce cannot rest on the principle stated by the Vice-Chancellor in his judgment, namely, that where, by the *lex loci contractûs*, the marriage is indissoluble, it cannot be dissolved by the sentence of any tribunal. Such a principle is at variance with the best established rules of universal jurisprudence, that is to say, with those rules which, for the sake of general convenience and by tacit consent, are received by Christian nations and observed in their tribunals. One of these rules certainly is, that questions of personal *status* depend on the law of the actual domicile.

It is said by a foreign jurist of authority, *Rodenburg*, and his works are cited with approbation by many recent writers, "*Unicum hoc ipsa rei natura ac necessitas invexit, ut cum de statu et conditione hominum quæritur, uni solum modo Judici, et quidem Domicilii, universum in illâ jus sit attributum* (1)." This position, that "*universum jus*," that is, jurisdiction which is complete and ought to be everywhere recognised, does, in all matters touching the personal *status* or condition of persons, belong to the Judge of that country where the persons are domiciled, has been generally recognised.

The language of *Boullenois* (2), a French jurist of authority, is to the same effect. His position is, that the laws of a sovereign extend over persons domiciled *within* his territory, and over property which is there situate.

That this rule is one which is introduced by "*ipsa rei natura ac necessitas*," is well illustrated and enforced by Lord *Brougham*, in his judgment in the case of *Warrender* v. *Warrender*.

If, as is certain, the domicile of origin may be effectually put off, and a new domicile acquired by persons who are *uni juris*, it must follow that such persons thereby become, to all intents and purposes, subject to, and entitled to the benefit of, the laws and institutions of the adopted country, in like manner as they were entitled and subject to the laws of the domicile of origin, and that without becoming aliens in their own native country.

(1) De Stat. Divers tit. 1, c. 3, s. 4. (2) Des Stat. Princ. Gen. 6, p. 4.

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Mr. Justice *Story*, in his book on the Conflict of Laws (1), cites a judgment delivered by the Supreme Court of *Pennsylvania*, in which, after observing that a *bonâ fide* domicile, in the strictest sense of the word, was essential to jurisdiction to pronounce a divorce *à vinculo matrimonii*, Chief Justice *Gibson* treats the British tenet of perpetual allegiance as the root of the English doctrine of the indissolubility of the marriage contract. I hardly need observe that this is an unfounded notion, and that the political maxim of *nemo potest exuere patriam*, which preserves the duty of allegiance notwithstanding the change of domicile, has nothing to do with the personal relations and rights of British subjects under civil contracts.

If it were permitted by this House to be supposed that the law of this country was to the effect stated by the Vice-Chancellor, viz., that the *lex loci contractûs* enters into and forms part of the marriage contract, so that if, by the law of the country where the marriage is solemnized, and of which the parties are natural-born subjects, no divorce *à vinculo* can be granted, and such marriage is everywhere indissoluble, it would be a conclusion that would lead to the most startling results. Suppose two Roman Catholics, who, having married in *Spain*, afterwards become Protestants, and are *bonâ fide* domiciled in this country, where they reside for years, could it be held that the husband was bound by the *lex loci contractûs* from seeking a divorce from his wife by reason of adultery committed during such residence? On the other hand, suppose two Prussian subjects married at *Berlin*, where a divorce may be obtained for incompatibility of temper, could they, on becoming domiciled in *England*, claim a divorce on such a ground before the tribunals of this country, where such a ground of divorce is not judicially recognised? Many other cases might be put, but it is unnecessary to do so, for I apprehend there is no substantial authority for the position. In *England*, since the Reformation, marriage, being no longer a sacrament, has always, in theory of law, been dissoluble for adultery in the wife, and for incestuous adultery and other crimes by the husband; but, until the recent *Divorce Act*, this law was administered by Parliament alone, and, although the decision of Parliament was in the form of an Act or

(1) Sect. 205, n.

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privilegium, and not of a judicial decree, yet the Act was granted upon evidence proving that the case came within the scope of certain established rules. This proceeding was in spirit a judicial, though in form a legislative act. The justice of divorce was recognised, but no forensic tribunal was entrusted with the power of applying the remedy. But the law and practice of Parliament were well known; and, in fact, this House acted as a Court of justice. It cannot, therefore, be correctly said, that divorce *à vinculo matrimonii* was contrary to the principles and institutions of this country. It follows that the validity of a foreign decree of divorce must be ascertained in the same manner and on the same rules by which the conclusive effect of other foreign judgments has to be determined.

The position that the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects, is competent to pronounce a similar decree between English subjects who were married in *England*, but who before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a *bonâ fide* suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the Judges in *Lolley's Case*.

The facts of *Lolley's Case* are not fully stated in every report or note of it; but from the report of it in *Russell & Ryan* (1), and the observations of Lord *Brougham* (who was one of the counsel in the cause), made in *Warrender* v. *Warrender* (2), correcting some erroneous observations in a previous case, *McCarthy* v. *Decaix* (3), in the Court of Chancery, it would seem that the material facts were similar to the present case. *Lolley* and his wife were married in *England*, where they were domiciled at the time of their marriage, and also at the time of their alleged divorce in *Scotland*. And although it does not appear that there was any actual collusion in the suit, yet it is stated that *Lolley* took his wife to *Scotland* in order that she might institute a suit of divorce there, and that adultery was, with a view to such a suit, committed by *Lolley* in *Scotland*. The resolution of the Judges in *Lolley's Case* is com-

(1) Russ. & Ry. 237.
(2) 2 Cl. & F. 567.
(3) 2 Russ. & Myl. 614; 2 Cl. & F. 568.

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monly cited as involving a very different conclusion from that which the resolution, strictly construed, really expresses; for the resolution was, that no sentence or act of any foreign country or state could dissolve an English marriage *à vinculo matrimonii* for grounds on which it was not liable to be dissolved *à vinculo* in *England;* a resolution which is consistent with the conclusion that English law would admit the validity of a decree of divorce *à vinculo* by a foreign tribunal for ground recognised as sufficient by the law of *England* (whether administered by Parliament, or by a Court, is immaterial) to justify a divorce *à vinculo matrimonii*. *Lolley's Case* was, without question, rightly decided; but it does not involve the conclusion that the Judges held the Scotch decree of divorce of no effect *because* an English marriage was indissoluble by English law. There are other and legitimate grounds of decision to which the judgment in *Lolley's Case* may, and in my opinion ought, to be referred. Throughout the Scotch proceedings the domicile of both parties was in *England*, and the residence in *Scotland* was temporary only, and intended only for the purpose of having a suit for divorce instituted. The Judge, therefore, was not the Judge of the domicile; the suit was not *bonâ fide*, and the whole proceeding was in fraud of English law, and injurious to English interests. It has been supposed that *Lolley's Case* was recognised by Lord *Eldon* in the case of *Tovey* v. *Lindsay* (1), which came before this House in 1813. But on an examination of the judgments in that case in *Dow's* reports, it will be seen that one main difficulty felt by Lord *Eldon* as to the validity of the Scotch divorce, arose from the circumstance of the parties not being domiciled in *Scotland* at the time of the decree. So Dr. *Lushington*, in the case of *Conway* v. *Beazley* (2), appears to have thought that the true ground of the invalidity of the decree of divorce in *Lolley's Case*, was the fact of the parties not being domiciled in *Scotland* at the time.

In the case of *Warrender* v. *Warrender* a marriage solemnized in *England* was dissolved by the decree of the Scotch Commissary Courts. Some suggestion was made in the speech of Lord *Brougham*, and apparently for the purpose of escaping from the resolution in *Lolley's Case*, that as the husband was a domiciled

(1) 1 Dow. 117. (2) 3 Hag. Ecc. Rep.

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Scotchman at the time of the marriage, the wife being an Englishwoman, and the parties at the time of the marriage intending to reside in *Scotland*, the marriage must be regarded as a Scotch, and not an English contract. But, with great deference, I cannot consider this suggestion as well founded, or entitled to weight; and the decision of this House ought to be rested on the grounds assigned both by Lord *Lyndhurst* and Lord *Brougham*, namely, that the husband who obtained the divorce was throughout a domiciled Scotchman, and that as no other domicile could be legally ascribed to the wife, both parties were domiciled in *Scotland* at the the time of the suit and of the decree.

This was followed by the case of *Dolphin* v. *Robins* (1), in which it was decided that where the parties to an English marriage went to *Scotland* for the purpose of founding jurisdiction, the Scotch Courts had no jurisdiction to entertain a suit for divorce, inasmuch as the parties were not *bonâ fide* domiciled in *Scotland*.

So in *Pitt* v. *Pitt*, which was decided by this House in 1864 (2), the counsel for Colonel *Pitt* admitted that the sentence of divorce which he had obtained in *Scotland* could not be upheld, unless it could be shewn that before and during the suit Colonel *Pitt* was permanently domiciled in *Scotland;* and this House being of opinion that he had no such domicile, held that the Scotch Court had no jurisdiction to pronounce the decree of divorce. The point, therefore, must be regarded as finally settled by decision, on grounds wholly independent of the resolution in *Lolley's Case*.

It follows that the marriage of Mr. and Mrs. *Buxton* was legally subsisting at the time of the second marriage between Mrs. *Buxton* and Mr. *Shaw*; and that the second marriage was therefore void, and the issue of it cannot claim to be entitled by English law to the benefit of the trust previously declared for the children of *Elizabeth Hickson*.

But even if the first husband, Mr. *Buxton*, had been permanently domiciled in *Scotland* before and at the date of the decree for divorce, in which case the Scotch Courts might have had jurisdiction, I should still have been of opinion that the decree was not binding, as having been collusively obtained. But I abstain from resting my judgment upon this ground, because I entertain a

(1) 7 H. L. C. 390. (2) 4 Macq. Sc. Ap. 627.

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doubt whether collusion could be now used as a sufficient reason for setting aside the decree after the deaths of all the parties to the proceeding.

1 P. D. 146-7

It must be admitted that there has been a series of decisions in the Scotch Courts to the effect that a permanent domicile of parties is not necessary to found a jurisdiction in the Scotch tribunals to pronounce a decree of divorce *à vinculo* between parties who have been married in *England*, or any other foreign country; and that if the Defendant in any such suit has been resident for forty days in *Scotland*, it is sufficient to subject him to the jurisdiction of a Scotch tribunal in a suit for divorce. It would, however, seem to be the law of *Scotland* that if the divorce be sought on the ground of adultery, the adultery must have been committed in *Scotland*. The whole reasoning of the Judges in the Scotch cases is founded upon the right of the Scotch Courts to redress any wrong committed by either of the spouses if the act be done within the territory of *Scotland*. And that if divorce be sought on the ground of a personal wrong committed within the jurisdiction of a Scotch Court, it is the right of the party who suffers the wrong to have that remedy which the law of the country affords. Such reasoning however, although it may be good for maintaining the validity of the Scotch divorce in *Scotland*, cannot be required to be accepted by the tribunals of another country. The result is, that a sentence of divorce under such circumstances may be binding in *Scotland*, although of no validity in the territory of *England*.

The inconvenient consequences of this state of the law are obvious, and have been frequently exposed with great force, particularly by Lord *Brougham* in his speech in giving judgment in the case of *Warrender* v. *Warrender* (1). But this disgraceful anomaly can only be removed by the Legislature.

For these reasons I am of opinion that the decree of the Vice-Chancellor was correct, and ought to be affirmed.

LORD COLONSAY :—

My Lords, this case brings us into contact with principles of vast importance. In handling and applying those principles we must

(1) 2 Cl. & F. 488—520, *et seq.*

be careful neither to impair them, nor to extend them beyond their proper limits.

The facts out of which the case has arisen have been repeatedly stated, and I shall not recapitulate them. The practical question is, whether the Appellants are entitled to certain interests under the will of their mother's great uncle, *John Wilson*, of *Stenson*, in the county of *Derby?* The will is dated the 27th of February, 1832. Mr. *Wilson* died on the 2nd of October, 1835, and the Appellant's mother died on the 28th of July, 1863. By the will the interest now in question (I speak at present of the personal estate), is held in trust for "all and every the child or children of my said great niece," meaning thereby the lawful or legitimate children of his said great niece. The Appellants are undoubtedly her children, born of a marriage contracted by her with *John Shaw*, and celebrated in regular form *in facie ecclesiæ*, at *Edinburgh*, on the 17th of June, 1846. At the time of the marriage Mr. *Shaw*, though a native of *England*, was living in *Edinburgh*, studying law, with the view to becoming an advocate at the Scotch bar, to which he was soon thereafter called, and at which he practised till his death in 1852. The fixed residence of Mr. and Mrs. *Shaw* was at *Edinburgh*, and their children, the Appellants, were all born there. *Primâ facie*, then, they are the lawful or legitimate children of their mother, and it does not appear that their *status* as legitimate children has ever been questioned in the country in which they were born, and in which their father had his permanent domicile at the time of their birth. Nevertheless, there may be a fatal flaw in their pretension to legitimacy, and the Respondents say that there is such a flaw; that the marriage of their parents was invalid in respect that at the date of it their mother was the lawful wife of *Thomas Buxton*, a domiciled Englishman, to whom she had been married at *Manchester*, in June, 1828, and who was still alive at the date of her marriage with *Shaw*, and was known to the parties to be then alive. The answer made to that plea is, that the marriage with *Buxton* had been dissolved by a decree of divorce, *à vinculo*, on the ground of the husband's adultery, pronounced by the Court of Session in *Scotland*, in March, 1846, being some months before the marriage with *Shaw;* and that the marriage with *Buxton* having been so dissolved it was no longer an obstacle

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to her contracting a valid marriage with *Shaw*, and no bar to the legitimacy of the children born of that marriage. But the Respondents deny the validity or efficacy of the decree of divorce, or that it could either in *Scotland* or in *England* have the effects ascribed to it, and they contend that it must be treated as a nullity; that, consequently, the marriage with *Shaw* must also be treated as a nullity, and that the children born of that connection must be regarded as illegitimate, both in *Scotland* and in *England*, or, at all events, in *England*.

The reasons in support of this contention are set forth in specific propositions in some parts of the case for *Ambrose Moore and Others*, and substantially to the same effect at other parts of the case for *John Wilson Moore* and *William Cunningham Moore*, and I did not understand that any of these propositions was departed from in the argument. Some of them I am not disposed to affirm. They may not be necessary to the decision of this case, but having been advanced in the course of it, and having, as appears to me, received countenance from the terms in which the very learned Judge in the Court below is reported in the print before us to have expressed himself in giving the *rationes* of his judgment, I think it necessary to notice them. Whatever may be my judgment on the case, I am desirous to exclude possible misapprehension as to the elements that enter into it.

When it is said in unqualified terms that a marriage duly celebrated in *England*, according to the rites of the English Church, ought to be regarded and treated by the Courts of other countries as a contract involving the element of absolute indissolubility as of its essence, and ought not to be under any circumstances dissolved by decree of a foreign Court; in short, that a foreign Court has no power to dissolve an English marriage; that is a proposition in general or international law, and would require to be maintained by reference to recognised rules of international law, or general principles of jurisprudence. But although the proposition has been introduced into this case it has not been supported by any such reference, and I cannot assent to it as resting on any recognised rule of international law. It appears to me to involve more than one fallacy. It assumes as a basis that absolute indissolubility is an inherent quality of an English marriage, necessarily attach-

ing to it under all circumstances. Then, building on that basis, it assumes that as regards international law the relation of husband and wife stands on the same footing as ordinary business contracts. And, farther, it assumes that the *lex loci contractûs* must be the sovereign rule for determining all questions as to the rights, duties, and obligations arising out of that relation, and the remedy or redress to be given in the event of either party acting in violation of the contract.

I hold each and all of these assumptions to be more or less erroneous. Is it sound that absolute indissolubility is an inherent quality of marriage when celebrated in *England* according to the rites of the English Church? Is it so regarded even in *England*? I have heard no authority for that. The terms of the opinion of the twelve Judges in the case of *Lolley*, as reported, appear to me to imply the reverse. The words are, that they are "unanimously of opinion that no sentence or act of any foreign country or state could dissolve an English marriage *à vinculo* for ground on which it was not liable to be dissolved *à vinculo* in *England*." These words appear to me to be qualified, and to imply that for some ground an English marriage is liable to be dissolved *à vinculo* in *England*. That the procedure for obtaining dissolution of marriage should be by bill in Parliament, and not by a suit in Court, proves only that in *England* the power of decreeing dissolution had not yet been conferred on any *Court;* not that absolute indissolubility was regarded as an inherent quality of marriage. The procedure, though Parliamentary, was substantially judicial—the allegations were investigated, and, if substantiated, the relief sought was granted as matter of right and justice. In short, Parliament was the tribunal for such cases, and was resorted to as matter of recognised procedure by those who sought relief on good grounds, and could afford to pay for it. The indissolubility of an English marriage in *England* was true only in this sense—that no *Court* in *England* had power to dissolve an English marriage, or, indeed, any other marriage—and in this other sense, that to the great bulk of the community the want of any such Court had the effect of making their marriages practically indissoluble because they could not afford to avail themselves of the cumbrous and expensive machinery by which alone the desired result could be obtained.

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The establishment of a Divorce Court in 1857 took away both of these causes for popularly describing English marriages as indissoluble, and they are no longer so described; their dissolubility is now patent. But did the establishment of a Court to administer the law of divorce alter the inherent qualities of marriage, that is, of the institution called marriage, as it existed in *England* and in all other Protestant countries? I think it is impossible to ascribe to the Act of 1857 the effect of altering the inherent qualities of that domestic relation as already constituted, and up to that date subsisting between all the living married pairs throughout the kingdom. And if it did not do so as to marriages then existing it did not do so at all, for it makes no distinction between marriages then existing and future marriages. By devolving on a new tribunal some of the duties in regard to the administration of justice previously discharged by Parliament, increased facilities were given for obtaining the remedy of divorce *à vinculo;* but the element of dissolubility was not thereby introduced into a domestic relation from which that element had hitherto been absolutely excluded as inconsistent with the essence of the relation. Indissolubility was not in principle an inherent quality of an English marriage before 1857 any more than it is now, although the means of obtaining the remedy are more accessible than they were. That it is given by one tribunal, or by one form of proceeding, rather than another, is immaterial, and does not affect any principle of jurisprudence or international law. Therefore to say that in 1846 an English marriage was indissoluble save by an Act of the Legislature, is of no more pertinency to the question of international law than to say that now it is indissoluble save by a decree of the Court of Divorce.

Farther, in reference to the bearing of general law, is it a sound view that marriage stands on the same footing as ordinary business contracts, and that the *lex loci* must furnish the sovereign rule for determining all questions in regard to the rights, duties, and obligations arising out of the contract, and the redress competent to be given? There appear to be some very obvious differences. In ordinary contracts each contract depends entirely on, or rather consists of, such conditions as it may be the pleasure of the contracting parties to stipulate; whereas marriage, though classed

among contracts, is an institution—a domestic relation of parties recognised in all Christian countries, the essentials of which are not to be looked for in conditions prescribed in each case according to the pleasure of the contracting parties, or in the formalities or words of the ceremonial used in constituting the relation, but in duties, rights, and obligations which spring from the relation itself when constituted. Certain formalities may be necessary to constitute the relation. These may vary in different countries; and in any inquiry as to whether the relation has been duly constituted, the *lex loci contractûs* governs. That is a recognised principle of jurisprudence in most countries. But what authority is there in general law for holding, as a universal rule, that the *lex loci contractûs* must govern in regard to all the results and incidents, especially as to the remedy or redress to be given in the event of violation of the primary duties and obligations? I know of no authority for that, unless we read in that sense the opinion of the Judges in the case of *Lolley*, and some passages in the judgment we are now reviewing. I believe that at first there was a pretty general impression that the opinion in the case of *Lolley* rested on the absolute indissolubility of English marriages, and the supremacy of the *lex loci contractûs* under all circumstances. But it does not appear to have been accepted and acted upon in that sense in other cases, in later times. In the case of *Conway* v. *Beazley*, Dr. *Lushington* anxiously guarded himself from being supposed to accept it as an authority for any such broad doctrine, and limited his recognition of it to the case of parties domiciled in *England* resorting temporarily to a foreign country for the purpose of obtaining divorce. That may, or may not, be a good ground for denying effect to the foreign decree, but it is a ground altogether different from the theory of absolute indissolubility, or the supposed supremacy of the *lex loci contractûs*. I read the observations of Lord *Cranworth*, in the case of *Dolphin*, as implying a similar limitation.

Then, whatever may have been the impression originally produced on the minds of lawyers in this country, or in other countries, by the opinion of the Judges in the case of *Lolley;* or whatever may have been the impression in the minds of the very eminent Judges who gave that opinion, I think that more recent

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cases indicate, at the very least, a hesitation, and I may perhaps be permitted to say a very reasonable hesitation, on the part of eminent English Judges to accept the case of *Lolley* as an authority for the theory of absolute indissolubility, or for the doctrine of the absolute supremacy of the *lex loci contractûs* under every state of circumstances in the matter of divorce. I venture to think that that doctrine has no solid foundation in authority, that there is no such universal rule of international law. The hesitation (to use no stronger word) of eminent English Judges to commit themselves to the doctrine of the supremacy of the *lex loci contractûs* in the matter of divorce under all possible circumstances, entitles me to say that *England* cannot be cited as a country which recognises that doctrine. We know that it is not acknowledged in the neighbouring country of *Scotland*, although in no country has the law of divorce, in all its bearings, been discussed more thoroughly, or with greater ability and learning. We see that from a very remote period, certainly from the date of the Reformation, the law of that country, and the constant practice of its Courts, has been to decree divorce *à vinculo* for proved adultery in all cases in which the parties were at the date of the proceedings properly subject to their jurisdiction, applying the *lex fori*, no matter in what country the marriage may have been contracted. That such is the settled law of *Scotland* was recognised in this House in the case of *Warrender*. In that particular case there was the element of domicile, inasmuch as Sir *George Warrender* was a domiciled Scotchman, but the marriage was an English marriage—a marriage celebrated in *England*, according to the rights of the English Church; and the *lex loci contractûs* was not allowed to be any obstacle to sustaining the validity of the decree of divorce *à vinculo*. Then we have been referred to the work of an American jurist of great celebrity, who writes on the conflict of laws, and who expresses his sympathy with the law of *Scotland* on this point; and his unwillingness to recognise the case of *Lolley* as a sound exposition of the general law, if that case is to be read in the sense in which it appears to have been at one time understood. We have not been referred to any authority the other way.

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The fallacies that have lurked in undefined notions of the indissolubility of English marriages, and the omnipotence of the *lex loci*

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contractûs, being dislodged, what are the rules by which we should be governed in deciding this case? Assuming in the meantime that the case depends entirely on the reception (so to speak) to be given to the foreign decree of divorce, it is to be observed that the Respondents deny that the decree is valid according to the law of the country in which it was pronounced. If we are to go into that inquiry we must deal with it upon the evidence, and the evidence, so far as it goes, is in favour of the validity of the decree. Of course I do not include in the evidence an opinion said to have been given by a witness, not in this cause, and which had no reference to the question of jurisdiction.

I therefore presume that we must deal with the case on the footing that the decree is, or may be, a valid decree of divorce in *Scotland*. Then why is that decree to have no effect given to it in *England?* not because the English marriage was absolutely indissoluble; not because the *jus gentium* restrains the Courts of one country from dissolving a marriage celebrated in another country, or holds that the *lex loci contractûs* is necessarily imported in its totality into whatever country the parties may go to. It must be because the circumstances of this case bring it within some exception recognised in general law, or because the law of *England*, irrespective of any rules of general law, refuses to give effect to such a decree. The main feature of the case in this view is that the parties, at least *Buxton* the husband, being a domiciled Englishman, having no connection with *Scotland*, went there for the purpose of giving to the Scottish Court jurisdiction in the suit for divorce at the instance of his wife. I think that the English cases referred to, viz. *Lolley's Case*, and *Conway* v. *Beazley*, and the case of *Dolphin*, are precedents to the effect that the Courts of *England* will not recognise a decree of divorce obtained under such circumstances, and that, sitting in an English Court, I am bound to respect these precedents so far as they go; and they may be sufficient for the decision of the present case. At the same time I may be permitted to say, that I am not so clear in my apprehension of the principle of general law on which those decisions proceeded.

It was said that a foreign Court has no jurisdiction in the matter of divorce, unless the parties are domiciled in that country; but what is meant by "*domicile?*" I observe that it is designated

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sometimes as a *bonâ fide* domicile, sometimes as a *real* domicile, sometimes as a *complete* domicile, sometimes as a domicile *for all purposes*. But I must, with deference, hesitate to hold that on general principles of jurisprudence, or rules of international law, the jurisdiction to redress matrimonial wrongs, including the granting of a decree of divorce *à vinculo*, depends on there being a *domicile* such as seems to be implied in some of these expressions. Jurisdiction to redress wrongs in regard to domestic relations does not necessarily depend on domicile for all purposes. If the decisions to which I have referred proceeded on the ground that the resort to the foreign country was merely for the temporary purpose of giving to the Courts of that country the opportunity of dealing with the case according to their own law, and thereby obtaining a dissolution of the marriage, and that such was the object of both parties, these decisions might be said to derive support from principles of general law, on the ground of being *in fraudem legis*. But if you put the case of parties resorting to *Scotland* with no such view, and being resident there for a considerable time, though not so as to change the domicile for all purposes, and then suppose that the wife commits adultery in *Scotland*, and that the husband discovers it, and immediately raises an action of divorce in the Court in *Scotland* where the witnesses reside, and where his own duties detain him, and that he proves his case and obtains a decree, which decree is unquestionably good in *Scotland*, and would, I believe, be recognised in most other countries, I am slow to think that it would be ignored in *England* because it had not been pronounced by the Court of Divorce here. How would the Court of Divorce here deal with the converse case? I can figure many phases in which the question of the efficacy of a decree of divorce may present itself, and I am unwilling, in the present case, to go farther than to say that the cases referred to satisfy me that the law of *England* does not acknowledge the validity of a decree of divorce obtained in the circumstances disclosed in this case.

There is still another point in the case which has raised some doubt in my mind. It is this: Assuming, as we must do, on the evidence, that, according to the law of *Scotland*, the marriage of the father and mother of the Appellants was a valid marriage, and they are children lawfully procreated of that marriage, and so in

their own country legitimate from their birth, is that *status* to be denied to them in this country on the ground that is here pleaded? I do not question the logic of the reasoning by which the conclusion has been reached, that if there was no valid divorce there was an incapacity to marry, and, consequently, no valid marriage. But there was a valid divorce, and a capacity to marry in the territory, and when that marriage has resulted in the birth of children, who have the *status* of legitimate children according to the law of their own country, are we in reference to them and their rights to revert to an inquiry, at whatever distance of time, as to whether *Buxton's* resort to *Scotland* was, or was not, for the purpose of facilitating the divorce? That has not been directly decided in any of the cases—not even in the case of *Vardill*—but I think the cases tend in that direction so strongly that I cannot, especially after the opinions now delivered, take upon myself to suggest a doubt as to their being the law of *England*, although I do not see my way to reconciling it with general principles of jurisprudence, or the generally recognised rules of international law.

As to the plea founded on the doctrine of putative marriage, I am not disposed to give effect to it in this case. In the first place, I am not satisfied that the doctrine is at all recognised in the law of *England*. In the second place, assuming that it is recognised in certain cases, I do not see how the law of *England*, which treats the divorce as a nullity, can admit the application of the doctrine in this case. The doctrine is founded on ignorance of fact, not on error in law. There was no ignorance of the fact of the marriage to *Buxton*, or of the fact that he was still alive. Courts of law treat the law of a foreign country as matter of fact, in the sense that it requires to be established by evidence, but only in that sense. They do not regard the law of their own country as matter of fact, and, consequently, in an English Court the inefficacy, in *England*, of the divorce, must be regarded as matter of law, not of fact. Again, if it be said that in *Scotland*, and to parties in that country, the law of *England* was matter of fact, I do not think that would advance the argument, because the condition of the argument is, that in *Scotland* the Appellants are legitimate without the aid of the doctrine in question.

On the whole, I feel bound by the authority of the cases to the

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effect I have stated, and I think that is sufficient for the present case.

The learned Judge in the Court below refers to the monstrous consequences that would result from recognising the possibility of a man having two lawful wives, one in *England*, and another in some other country. But I think he has failed to perceive that such a state of matters would be promoted rather than restricted by the doctrine of absolute indissolubility, and of the supremacy of the *lex loci contractûs*, while it would not exist if effect was given to the foreign decree of divorce.

LORD CRANWORTH :—Before the question is put by my noble and learned friend on the woolsack, I wish to advert to an observation that was made by my noble and learned friend on my left (Lord *Chelmsford*) as to what fell from me in the case of *Dolphin* v. *Robins*. My noble and learned friend remarked that he could not subscribe to the opinion I there expressed, "that it must be taken now as clearly established that the Scotch Court has no power to dissolve an English marriage where the parties are not really domiciled in *Scotland*." My noble and learned friend says that that proposition is too extensively stated; because it may be that such a decree of dissolution of marriage, although the parties are not *bonâ fide* (whatever that may mean) domiciled in *Scotland*, may be perfectly valid in *Scotland*. In the observations which I recently addressed to your Lordships I adverted to that distinction here. All that I meant to say was, that such a decree of divorce is not valid *quoad* its operation in this country. That was what I meant in what I said in *Dolphin* v. *Robins*. If the words which I used in *Dolphin* v. *Robins* are fairly to be construed in a more enlarged sense, I beg to say that I entirely concur with my noble and learned friend in thinking that they were too largely stated; and I am very glad that my noble and learned friend has called my attention to them, so that whenever that case may be referred to hereafter, it may be clearly understood that I qualify them as I have now stated, that is to say, that the Scotch Court has no power to decree a valid divorce *quoad* its operation in this country.

My Lords, in moving that this appeal be dismissed, I have not

proposed that it be dismissed with costs. I do not know whether the Respondents in this case would be disposed not to press for costs.

LORD WESTBURY:—On the subject of costs, my Lords, I hope that what my noble and learned friend has said, that the appeal should be dismissed without saying anything about costs, will not for a moment be supposed to give any kind of warrant to a practice very much to be deprecated, of having a discussion at the Bar on the subject of costs. I think, if that should be the unanimous feeling of your Lordships, that in the circumstances of this case justice would be met by simply dismissing the appeal.

LORD CRANWORTH:—I wish to state that I quite concur with my noble and learned friend. I certainly have a very strong opinion that the ordinary rule ought to be that the losing party pays for the appeal; and I quite agree with my noble and learned friend that there ought to be no discussion whatever at the Bar about costs; but what I wanted to know was whether, in the circumstances of this case, the Respondents would be satisfied to say nothing about costs. In that case I should simply move that the appeal be dismissed.

LORD CHELMSFORD:—I quite agree that the costs ought to follow the result of the appeal. But I agree with my noble and learned friend in expressing a hope that the Respondents, under the circumstances of this case, will not press for costs in this case.

Mr. *Coleridge*:—My Lords, I am instructed by my clients, the Respondents, to say that they accede to your Lordships' wish, that we should not say anything about costs.

Order affirmed, and appeal dismissed.

Lords' Journals, May 7, 1868.

Solicitors for the Appellants: *Harrison, Beale, & Harrison.*

Solicitors for the different Respondents: *Davidson, Carr, & Bannister; Hampton & Burgin; Few & Co.; Rogers & Jull; Brace & Leathes.*

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April 30;
May 1, 29.

GEORGE ROUTLEDGE AND OTHERS . . . APPELLANTS;

AND

SAMPSON LOW AND OTHERS, AND MARIA CUMMINS . . . . . } RESPONDENTS.

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Per Lord *Cairns*, L.C.:—The object of the 6th section of the statute was to obtain for the *British Museum* a copy of every book published anywhere under British rule, whether there should be copyright in the book or not.

British copyright, when once it exists, extends, under the 29th section of the statute, over every part of the British Dominions.

Per Lord *Cairns*, L.C., and Lord *Westbury*:—The protection of the statute is given to every author who first publishes in the *United Kingdom*, wheresoever he may then be resident (*dub.* Lord *Cranworth* and Lord *Chelmsford*).

THIS was an appeal against a decision of the Lords Justices (1), which had affirmed a previous decision of Vice-Chancellor *Kindersley* (2). The Appellants, *Routledge & Co.*, and the Respondents, *Low & Co*, were booksellers and publishers in *London*. The Respondent, *Maria Cummins*, was an American lady domiciled in *New York*. Miss *Cummins* had composed a work called "*Haunted Hearts*," the MS. of which, in April, 1864, she transmitted to Messrs. *Low* for publication in this country, and it was arranged between them that she should go to *Montreal*, in the British province of *Canada*, and reside there for a short time before, at, and after the time of the publication. This arrangement was fully carried into effect, copyright was duly assigned to Messrs. *Low*, and the work and the assignment were registered at *Stationers Hall*, in *London*, under the 5 & 6 Vict. c. 45, the assignor of the copy-

(1) Law Rep. 1 Ch. Ap. 42.

(2) 33 L. J. (Ch.) 717.

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right being described as "*Maria S. Cummins, Montreal, Canada,*" and the work was published by Messrs. *Low*, at *Ludgate Hill*, in two volumes, price 16*s*. Shortly afterwards Messrs. *Routledge* issued an impression of it in one volume at a price of 2*s*. After a short correspondence between the respective publishers, in which Messrs. *Routledge* denied that Messrs. *Low* could have "copyright in a work written by an alien, between whose country and our own no law of international copyright subsists," the Messrs. *Low* filed their bill in Chancery for an injunction; the Messrs. *Routledge* put in a demurrer to the bill; the cause was heard before Vice-Chancellor *Kindersley*, who, on the 22nd of April, 1865, overruled the demurrer, but suggested the existence of some errors in the registration, which were amended, and His Honour then granted an order for an injunction and an account. The case was taken by appeal before the Lords Justices, where it was arranged that it should be heard as on a motion for a decree; this was done, and on the 24th of November, 1865, they made a decree in favour of the Plaintiffs in the cause. The present appeal was then brought.

Sir *R. Palmer*, Q.C., and Mr. *Shapter*, Q.C. (Mr. *Schomberg*, Q.C., was with them) for the Appellants:—

It is admitted by the other side that the law of *Canada* conferred no copyright on the authoress. The question in this appeal must therefore be entirely decided on the law of *England*, and one question will be, whether the English law, in a case like this, has any effect where the person who composes a work is not resident in *England*, but in a British colony which has a Legislature and a law of its own. General laws made in *England*, and applicable to English cases and English subjects, will not affect this case. In *Cope* v. *Doherty* (1) the *Merchant Shipping Act* was held inapplicable where the Plaintiff and Defendant were owners of foreign ships which had damaged each other within the British seas. The law as to aliens justifies such a construction, making, as it does, a clear distinction between the rights possessed by a British subject and the protection afforded and the titles conceded to an alien. The 5 & 6 Vict. c. 45, does not disregard, but

(1) 4 K & J. 390.

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really enforces, that distinction. It repeals the 8 Anne, c. 19, and two other Acts; it defines copyright to be the sole right of publishing, and then declares that the words "British dominions" to which, by sect. 29, the Act is to apply, "shall be construed to mean and include all parts of the United Kingdom of *Great Britain* and *Ireland*, the islands of *Jersey* and *Guernsey*, all parts of the *East* and *West Indies*, and all the colonies, settlements, and possessions of the Crown, which now are or hereafter may be acquired." But it is clear that this extensive copyright is only to be enjoyed by British authors publishing in the *United Kingdom*, for the 6th section requires that the things published, the subject of copyright, shall be delivered within one calendar month after being offered for sale in *London*, or three calendar months in the *United Kingdom*. This term is extended to twelve calendar months if it is first published or offered for sale in any other part of the British dominions, but it is clear that such a publication does not confer British copyright. The 25th section makes copyright personal property, and the 29th section extends the Act to "every part of the British dominions." Now, referring the 29th section back to the 2nd section, it is remarkable that no mention whatever is made of colonies that have Legislatures of their own, and are not directly governed by legislation from *England*. *Canada*, certainly, is not expressly mentioned, and having a Legislature of its own, it cannot be impliedly included in the general words of the 29th section. General principles of law must be here introduced; and, even assuming residence in any of the British dominions to subject a person, for the time of his residence, to British laws, and to give him, generally, the advantage of those laws, still it has to be proved that a residence in a British colony which has laws of its own, will give him a right to peculiar advantages conferred by the laws of the *United Kingdom* on those who are personally resident in the kingdom itself.

If the principle of the decision in the case of *Jefferys* v. *Boosey* (1) is to be applied here, Miss *Cummins* cannot have the benefit of the laws of *England*, but only of those of *Canada*. Giving the largest meaning to the 5 & 6 Vict. c. 45, it only extends to authors, properly so called, who publish in *England*, and not to those who,

(1) 4 H. L. C. 815.

like Messrs. *Low*, are the mere transferees of their rights. Residence in a British colony gives to the person residing there the benefit of the laws of that colony, but nothing more. [LORD WESTBURY:—Do you admit the correctness of this part of the head note of *Jefferys* v. *Boosey* (1): "The object of the 8 Anne, c. 19, was to encourage literature among British subjects, which description includes such foreigners as by residence here owe the Crown a temporary allegiance."] It is admitted. [LORD WESTBURY:—Then only substitute for the word "here," which means the *United Kingdom*, the words "every part of the British dominions," which are found in the 29th section of the 5 & 6 Vict. c. 45, and what is the result?] No doubt the real question is, what is the meaning of those words considered with reference to the circumstances of this case. There was here some sort of residence in the colony. Did that give a right to copyright in all the British dominions, including the *United Kingdom* itself? Certainly not. In *Jefferys* v. *Boosey* the person entitled to benefit is declared to be a "British" author. What does that phrase mean? It must be confined to British subjects. There is not a word in the statute which points to an alien enjoying that *status* and such a continuing advantage as that of copyright, in virtue of a mere temporary residence within British dominions. Even the 32 Hen. 8, c. 16, s. 7, does not grant such extensive privileges to aliens in the matter of patents. *Calvin's Case* (2) no doubt shews that by residence an alien may acquire a local *status* and be subject to a temporary allegiance, and have a corresponding right to protection. But he does not thereby acquire all the rights of a British subject. *Blackstone* (3), *Thomas* (4), and *Story* (5), alike mark the distinction. The distinction has been applied under the *Legacy Duties Acts* in *Thomson* v. *The Advocate-General* (6); and *Wallace* v. *The Attorney-General* (7). And in *Donegani* v. *Donegani* (8), and *Re Adam* (9), the full rights of a British subject were held not to attach to a person who was an alien temporarily residing in a British colony. [THE LORD CHANCELLOR:—If a foreign author

(1) 4 H. L. C. 815. 11 Jur NS 615.
(2) 7 Co. Rep. 1.
(3) Com. vol. i. p. 370.
(4) Universal Jurisprudence, 209, 210, 342.
(5) Confl. Laws, ch. ii. s. 21.
(6) 12 Cl. & F. 1.
(7) Law Rep. 1 Ch. Ap. 1. 11 Jur NS 937
(8) 3 Knapp, 63.
(9) 1 Moo. P. C. 460.

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was actually resident in this country, would not that be sufficient?] That is a question different from the present; residence in the colony alone would not be so. Legitimacy conferred by an Act of the Parliament of *Ireland* is not sufficient to bind lands in *England*: *Crow* v. *Ramsey* (1). There "an *antenatus* of *Scotland* had been naturalized by an Act of Parliament of *Ireland*, and the question was, whether he was inheritable to lands in *England*," and the answer was in the negative; so that even if Miss *Cummins* had been naturalized by an Act of the Legislature of *Canada*, she would not have been entitled to all the rights of a British subject here. The patent law might give such rights to a foreign inventor whose invention was first made known in this country. The *Designs Act* (24 & 25 Vict. c. 73) in like manner expressly provides for the right of a foreign designer; but the *Copyright Act* has not the same words. As to copyright, the foreigner can only have the benefit of the law of the place where he first publishes his book. The author's rights here must depend on the Canadian Act. A local Act of Parliament is not, in the absence of any indication of intention on the part of the Legislature, repealed or suspended by a public general Act subsequently passed: *Fitzgerald* v. *Champneys* (2). Besides which, it is clear that whatever advantages are intended to be conferred on a foreigner resident in the colony, they can be claimed only by foreigners who are *bonâ fide* resident there. Here the residence was merely colourable.

The words in the 5 & 6 Vict. c. 45, seem very extensive, but do not give the right now contended for. All the British dominions were not put by the 29th section into the same category with the *United Kingdom*, nor residence in a colony made equivalent to residence here. The 8 Anne, c. 19, had said nothing of the place of publication. The case of *Jefferys* v. *Boosey* (3), decided on that statute, said that author in that statute meant a British subject, or some one who by residence here might come under that description. The 41 Geo. 3, c. 107, and the 54 Geo. 3, c. 156, aid in interpreting the statute now under consideration. The first spoke of the "British dominions in *Europe*," the next enlarged the area of the

(1) Sir T. Jones, 10.

(2) 2 J. & H. 55.

(3) 4 H. L. C. 815.

monopoly, protecting copyright in other parts of the British dominions, but both referred to copyright which had been created in the *United Kingdom*. Then came the present Act, 5 & 6 Vict. c. 45, which repealed the former statutes, and gave an extended term of copyright to those who had copyright under the former Acts, and to those who should publish after the passing of this Act. But all the machinery of the Act is plainly British, and consequently the statute must be construed as applicable in the Courts of the *United Kingdom* alone, according to the principle distinctly recognized with relation to the *Mortmain Act* in *Attorney-General* v. *Stewart* (1). [THE LORD CHANCELLOR:—Suppose the *Mortmain Act* declared that it was to be applicable to the colonies.] There would be great difficulties in knowing how to render it applicable. The 6th section of the statute 5 & 6 Vict. c. 45, appears by one phrase to bear a different meaning, but that must not be much regarded, for the sections from the 7th to the 16th all refer to acts which are only intelligible by being supposed to be acts done in this country, and with relation to this country. The 17th section is most important; it prohibits the introduction "into the *United Kingdom*, or into any other part of the British dominions, for sale or hire, any printed book first composed or written, or printed and published, in any part of the said *United Kingdom*, and reprinted in any county or place out of the British dominions." This plainly refers to a publication in this country by an author resident here. It gives a special remedy against the introduction of foreign reprints, a remedy which is enforced by various Customs Acts, which, on being referred to, appear to be equally restricted. One of these, the 8 & 9 Vict. c. 93, makes provision, in sect. 9, against the importation into any "British possession abroad" of books "composed, written, or printed in the *United Kingdom*, and printed or reprinted in any other country," thus confining the remedy to persons who have copyright in the *United Kingdom*; and the 63rd section expressly declares all laws passed "in any of the British possessions in *America*" which may be repugnant to that statute null and void. Then comes the 10 & 11 Vict. c. 95, passed for "the protection in the colonies of works entitled to copyright in the *United Kingdom*," which thus makes the clearest distinction between copy-

(1) 2 Mer. 143.

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right as existing in the *United Kingdom*, or existing elsewhere, taking no notice of copyright existing in the colonies. It does more to establish the distinction, for it provides for securing the rights of British authors by the means of the acts of colonial legislation. It is clear, therefore, that the *United Kingdom* and the colonies must not for such a purpose as this be treated as identical in respect to the rights of those who reside and publish in one or in the other.

Mr. *Mellish*, Q.C., and Mr. *Speed*, (Mr. *Hardy*, Q.C., was with them) for the Respondent in Error:—

The words in the 3rd section of the statute are in themselves unlimited, "every book published in the lifetime of its author." Who is an author within the meaning of that section? He is that person who has composed the book, without reference to his nationality. This book so composed by him must be first published in *London*, and an alien friend thus complying with the conditions of the statute is entitled to its protection. The 7 & 8 Vict. c. 66, declares, sect. 4, that an alien friend may "hold every species of personal property, except chattels real, as fully and effectually as a natural-born subject." The 25th section of the 5 & 6 Vict. c. 45, declares that "copyright shall be deemed personal property." Put these two sections of the two statutes together and the right of the Respondents is complete. It is not doubted that if a natural-born subject, being in *Canada*, had sent his work to *London* to be published, he would have been entitled to the copyright of it. By the force of these two statutes there is no distinction between the native and the foreign author. Then come the words of the 29th section of the 5 & 6 Vict. c. 45, which declare that that statute shall extend to "the *United Kingdom* and every part of the British dominions," which must include *Canada*. A temporary residence was there declared sufficient for the purpose of conferring on the author the copyright: *Jefferys* v. *Boosey* (1). The argument on the other side, while allowing a British author resident in *England* a copyright all over the colonies, would refuse a British author resident in a colony any copyright in *England*. That never could have been the intention of the Legislature. It is not necessary to argue whether the English statute supersedes a Canadian Act, and

(1) 4 H. L. C. 815: Per Lord *Cranworth* (Lord Chancellor), p. 955.

what would be the effect in *England* of a publication in *Canada*. If a man published in *Canada* he would, at all events, be entitled to such copyright as the law there gave him; if he publishes in *London* and complies with the conditions of the copyright statute here, he is entitled to all the advantages conferred by the statute: *Jefferys* v. *Boosey* (1) completely establishes that position. [*D'Almaine* v. *Boosey* (2); *Bentley* v. *Foster* (3); *Cocks* v. *Purday* (4); and *Boosey* v. *Davidson* (5), were also cited.] The only question therefore is, whether for this purpose publication here by a foreigner resident in *Canada* is not sufficient to secure for him the author's copyright in the work so published. That question must be answered in the affirmative, or the enactment in the 29th section of the 5 & 6 Vict. c. 45, will be rendered utterly nugatory.

Sir *R. Palmer*, in reply:—

It cannot be said here that the author has any right as a subject of the British Crown. Such rights as she has are the result of a temporary residence in a British colony, and are therefore local and colonial only.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in this case a decree was made in the Court of Chancery by Vice-Chancellor *Kindersley*, and affirmed by the Lords Justices, protecting in the usual way the copyright in a work called "*Haunted Hearts*"; and Messrs. *Routledge*, against whom this decree was made, complain of it and appeal from it to your Lordships.

The book or work called "*Haunted Hearts*" was composed by the Respondent, *Maria Susanna Cummins*. Miss *Cummins* is a domiciled citizen of the *United States of America*, but before publishing the work she went by arrangement to *Montreal*, in *Lower Canada*, for a few days, and while sojourning there the book was published in *London* on the 23rd of May, 1864. The book was published by the Respondents, Messrs. *Sampson Low & Co.*; and the copyright of the work, if copyright existed, was duly assigned

(1) 4 H. L. C. 815.
(2) 1 Y. & C. (Ex.) 283.
(3) 10 Sim. 329.
(4) 5 C. B. 860.
(5) 13 Q. B. 257.

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to them, and proper entries as to the copyright and the assignment were subsequently made at *Stationers' Hall.*

The precise case, therefore, which your Lordships have to consider is, whether an alien friend publishing in *London,* during the time of his or her temporary sojourn in a British colony or possession, an original work, is entitled to the protection of the English law as to copyright. The Appellants maintain the negative, the Respondents the affirmative of this proposition.

This is a question of importance to the parties to this litigation, but, even beyond their interest, it is of great general importance that there should be no doubt or misapprehension as to the law on the subject. The great object of the law of copyright is to stimulate, by means of the protection secured to literary labour, the composition and publication to the world of works of learning and utility; and the accomplishment of this object would be seriously thwarted by any want of clearness as to the terms on which, or the persons to whom, this protection is intended to be given.

The statute applicable to this case is the 5 & 6 Vict. c. 45. It is not an Act by way of supplement to any former statute. It repeals the former statutes as to copyright, and it proceeds upon the recital "that it is expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world."

There are three questions arising upon this statute which I will ask you to consider, and the answers to them will, as it seems to me, dispose of the controversy in the present case. First: where, in order to obtain a title of copyright, must the publication of the work take place? Second: what is the area in and throughout which the protection of copyright is given? And thirdly: who is the person entitled to that protection?

As to the question where must publication take place, I cannot doubt that the publication must be in the *United Kingdom.* The words in the 3rd section are, "every book which shall be published," without saying where; but it would be very inconsistent with the usual practice of the Imperial Parliament to create a system of copyright law for all the colonies and dependencies in the empire, many of which have representative institutions of their own, without any consultation with those colonies or dependencies,

and without any consideration whether a uniform and arbitrary system, such as that introduced by this Act, would be suitable to the varied circumstances, states of civilization, and systems of jurisprudence and judicature in these different colonies and possessions.

But there are, as it seems to me, still clearer indications in the Act of the intention of the Legislature on this point. By the 8th section copies of every book are to be delivered to various public libraries in the *United Kingdom* within one month after demand in writing, an enactment which in the case of a publication at the Antipodes could not be complied with. By the 10th section penalties for not delivering these copies are to be recovered before two justices of the county or place where the publisher making default shall reside, or by action of debt in any Court of record in the *United Kingdom*. By the 11th section the book of registry of copyrights and of assignments is to be kept at *Stationers' Hall*, in *London*, and no registry is provided for the colonies. By the 14th section a motion to expunge or vary any entry in this registry is to be made in the Court of Queen's Bench, Common Pleas, or Exchequer. These clauses are intelligible if the publication is in the *United Kingdom*, but hardly so if it may be in *India* or *Australia*. Finally, by the 17th section, there is a provision against any person importing into any part of the *United Kingdom*, or any other part of the British dominions, for sale or hire, any copyright book first composed or written, or printed and published in any part of the *United Kingdom*, and reprinted in any country or place out of the British dominions; a provision shewing clearly, as it appears to me, that publication in the *United Kingdom* is indispensable to copyright.

I have gone into this detail as to the place of publication, not so much because any difficulty on that score arises in the present case, for the publication here was in *London*, as because I observe that Vice-Chancellor *Kindersley* appears to have thought that the whole of the British dominions are, by the Act, brought into what he terms a "ring-fence," for every purpose of copyright, including publication.

I am unable to take this view of the Act. The 6th section, no doubt, affords some countenance to this construction, for it provides

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for the delivery to the *British Museum* of a copy of every book published after the Act; the delivery to be within one or three months if published within the *United Kingdom*, or within twelve months after publication in any part of the British dominions. But, my Lords, I cannot look on this section as throwing any light on the definition of copyright, or, indeed, as necessarily connected or correlative with copyright. It appears to me to have been introduced into the Act with the intention (whether that intention has succeeded or not is not now the question) of obtaining for the *British Museum* a copy of every book published anywhere under British rule, and whether there should be copyright in the book or not.

My Lords, the second question is as to the area over and through which protection is granted by the Act; and I cannot doubt that this area is the whole of the British dominions. The original *Copyright Act*, the 8 Anne, c. 19, protected copyright throughout *Great Britain*. The 41 Geo. 3, c. 107, extended this protection over the whole of the *United Kingdom*, and the British dominions in *Europe*. The 54 Geo. 3, c. 156, extended the protection still farther over the whole of the British dominions. And the 15th section of the present Act repeats in substance the same area for the purpose of protection.

My Lords, I think, farther, it is obviously with reference to the protection given by the Act, and the area over which that protection is given, that the 29th section provides that the Act should extend to the *United Kingdom*, and to every part of the British dominions.

My Lords, I come now to the third question, the most important one for the determination of the present case. To whom, as the composer or author of a work, is this protection given: to a native-born subject of the Crown, to an alien friend sojourning in the *United Kingdom*, to an alien friend sojourning in a colony, or to an alien friend resident wholly abroad?

My Lords, in my opinion the protection is given to every author who publishes in the *United Kingdom*, wheresoever that author may be resident, or of whatever state he may be the subject. The intention of the Act is to obtain a benefit for the people of this country by the publication to them of works of learning, of utility,

of amusement. This benefit is obtained, in the opinion of the Legislature, by offering a certain amount of protection to the author, thereby inducing him to publish his work here. This is, or may be, a benefit to the author, but it is a benefit given, not for the sake of the author of the work, but for the sake of those to whom the work is communicated. The aim of the Legislature is to increase the common stock of the literature of the country; and if that stock can be increased by the publication for the first time here of a new and valuable work composed by an alien, who never has been in the country, I see nothing in the wording of the Act which prevents, nothing in the policy of the Act which should prevent, and everything in the professed object of the Act, and in its wide and general provisions, which should entitle, such a person to the protection of the Act, in return and compensation for the addition he has made to the literature of the country.

My Lords, I am glad to be able to entertain no doubt that a construction of the Act so consistent with a wise and liberal policy is the proper construction to be placed upon it.

My Lords, as opposed to this conclusion we were much pressed with the case of *Jefferys* v. *Boosey*, decided by this House (1). That case was decided not upon the present *Copyright Act*, but upon the old *Copyright Act* of Queen *Anne*. On the construction of that Act six of the learned Judges who advised your Lordships were of opinion that a foreigner living at *Milan*, and composing a literary work there, could convey a title of copyright by assignment, under which his assignee, publishing here, was entitled to protection; four of the learned Judges were of a different opinion; and your Lordships unanimously held that the foreigner in that case could not give a title of copyright; and this must be taken to be the construction and effect of the statute of *Anne*. But, my Lords, it is impossible not to see that the *ratio decidendi* in that case proceeded mainly, if not exclusively, on the wording of the preamble of the statute of *Anne*, and on a consideration of the general character and scope of the legislation of *Great Britain* at that period. The present statute has repealed that Act, and professes to aim at affording greater encouragement to the production of literary works of lasting benefit to the world. And accepting

(1) 4 H. L. C. 815.

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the decision of this House as to the construction of the statute of *Anne*, it is, I think, impossible not to see that the present statute would be incompatible with a policy so narrow as that expressed in the statute of *Anne*.

My Lords, if you concur in this construction of the statute now in force, the Respondents will clearly be entitled to our judgment, and I propose to move that the decree of the Court of Chancery should be affirmed, and the appeal dismissed with costs.

LORD CRANWORTH:—

My Lords, I concur with my noble and learned friend in thinking that this appeal should be dismissed with costs. But in so concurring I must guard myself against being taken as assenting to the suggestion of my noble and learned friend, that the Act now regulating copyright (5 & 6 Vict. c. 45) must be taken as extending its privileges to all authors, aliens as well as natural-born subjects, who publish their works for the first time in this country. It is not necessary to come to any such conclusion in order to support the decree appealed from.

It is remarkable that the modern statute, though it repeals all the former statutes, nowhere defines or declares what is to be understood by the word "copyright." It assumes copyright to be a well-known right, and legislates in respect to it accordingly. I suppose, therefore, that copyright, except so far as it is extended expressly or impliedly by the language of the Act, must be taken to be confined to what it was at the passing of the Act; that is, to works first published in the *United Kingdom*. But I think it a reasonable inference from the provisions of the Act, that its benefits are conferred on all persons resident in any part of Her Majesty's dominions, whether aliens or natural-born subjects, who, while so resident, first publish their works in the *United Kingdom*. This was the case of Miss *Cummins*, and it is not necessary to say whether it extends farther; though there seems to me to be reasons almost irresistible for thinking that it does not. She was a foreigner resident at *Montreal*, and, while so resident, she published her work in *London*, which was its first publication—and that was, I think, sufficient to entitle her to the protection of the statute.

The decision of your Lordships' House in *Jefferys* v. *Boosey*, according to the opinions of all the noble Lords who advised the House on that occasion, rested on the ground that the statute of *Anne*, then alone in question, must be taken to have had reference exclusively to the subjects of this country, including in that description foreigners resident within it, and not to have contemplated the case of aliens living abroad beyond the authority of the British Legislature. The British Parliament in the time of Queen *Anne*, must be taken *primâ facie* to have legislated only for *Great Britain*, just as the present Parliament must be taken to legislate only for the *United Kingdom*. But though the Parliament of the *United Kingdom* must *primâ facie* be taken to legislate only for the *United Kingdom*, and not for the colonial dominions of the Crown, it is certainly within the power of Parliament to make laws for every part of her Majesty's dominions; and this is done in express terms by the 29th section of the Act now in question. Its provisions appear to me to shew clearly that the privileges of authorship which the Act was intended to confer or regulate in respect to works first published in the *United Kingdom*, were meant to extend to all subjects of Her Majesty in whatever part of her dominions they might be resident, including under the term "subjects," foreigners residing there and so owing to her a temporary allegiance. That Her Majesty's colonial subjects are, by the statute, deprived of rights they would otherwise have enjoyed, is plain, for the 15th section prohibits them from printing or publishing in the colony, whatever may be their own colonial laws, any work in which there is copyright in the *United Kingdom*. It is reasonable to infer that the persons thus restrained were intended to have the same privileges as to works they might publish in the *United Kingdom* as authors actually resident therein. And therefore I have no hesitation in concurring with my noble and learned friend in thinking that the decree below was right. I find it difficult to concur with him in the opinion that the present statute extends its protection to all foreigners wherever they may be resident, without saying that the case of *Jefferys* v. *Boosey* is not good law—a conclusion at which I should be very unwilling to come as to any case decided in this House, more especially as to one so elaborately considered as that of *Jefferys* v. *Boosey*. That

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case, as my noble friend has pointed out, was decided, not on the construction of the Act of the 5 & 6 Vict. c. 45, but on the old statute of Queen *Anne*; but I own I do not, as at present advised, see any difference between the two statutes so far as relates to the subject of the residence of foreign authors.

I have felt it my duty to make these remarks in order that I may not be taken to have accepted my noble and learned friend's exposition of the present statute as to foreign authors. If any question as to their rights should come before this House for decision, I wish to keep my judgment open on the point.

In the present case, as I have already stated, I concur with my noble and learned friend in thinking that this appeal should be dismissed with costs.

LORD CHELMSFORD:—

My Lords, the case of *Jefferys* v. *Boosey* finally decided that the statute of 8 Anne gives the copyright in a work only to British subjects or to foreign authors who at the time of the first publication are in this country. The direct subject of decision in that case was, that a foreign musical composer resident abroad, having assigned his right in a musical composition of which he was the author, to another foreigner (then also resident abroad), who brought it to this country, and, before publication, assigned it, according to the forms required by law, to an Englishman, no assignable copyright in this musical composition existed in *England*. There can be no doubt from what was said by the learned Judges who assisted, and by the noble Lords who advised the House in *Jefferys* v. *Boosey*, that if the foreign musical composer had himself brought his composition here, even although he came to this country solely with a view to publication, he would have entitled himself to copyright. Copyright under the statute of *Anne* was confined to *Great Britain*. Therefore, under that statute, in order to qualify himself to claim a copyright for any work which he had composed but not published abroad, a foreigner must, at the time of its first publication, have been resident within some part of the area over which the copyright extended, and to which it was limited.

But it was said that before the case of *Jefferys* v. *Boosey* the

copyright under the statute of *Anne* had been extended by the 41 Geo. 3, c. 107, to "all the British dominions in *Europe*," and by the 54 Geo. 3, c. 156, "to all parts of the British dominions," and therefore the decision in that case that the foreign author of a work must have been resident in *Great Britain* to entitle him to copyright, necessarily excluded the sufficiency of a residence in any other part of the Queen's dominions. But the Acts of 41 Geo. 3, and 54 Geo. 3, gave no actual extension to the area for the creation of copyright which was limited by the 8 Anne. Practically, no doubt, when persons are prohibited from reprinting a work in a particular place, and an action is given to the author of the work against them for doing so, he has a monopoly of the right of publication in that place. Yet, strictly speaking, his copyright under the statute is not thereby enlarged; but, for its better protection, a remedy is given for an infringement beyond the limits to which it extends. It is obvious that for the purpose of copyright a provision of this description cannot give any effect to a residence in any part of the Queen's dominions out of *Great Britain* which it did not before possess.

It having been settled that the term "author" in the statute of *Anne* is only applicable to a foreigner where he is resident in *Great Britain*, the question to be determined in this case is, whether the statute of the 5 & 6 Vict. c. 45, has not given that term a more extensive application. By the 29th section it is enacted, "that this Act shall extend to the United Kingdom of *Great Britain* and *Ireland*, and to every part of the British dominions." This section of the Act requires, for its full effect, that the area over which copyrights prevail should be limited only by the extent of the British dominions. But then it will follow that the term "author" must have a similar extension. For in the case of *Jefferys* v. *Boosey*, it was not doubted that the term "author," though intended to express a British subject, would apply to a foreigner taking up his residence within the limits to which copyright extended under the 8 Anne. And those limits being now enlarged by the 5 & 6 Vict., the residence which confers the rights of a British subject, as to copyright, upon a foreigner, may be in any part of the Queen's dominions. It was admitted in argument that a resident native of *Canada* would be entitled to the benefit

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of an English copyright. What reason is there for denying to a foreigner resident in *Canada* the privileges in this respect of a native Canadian?

There is a little difficulty in determining where the publication which confers the extensive privilege of copyright under the Act must take place. The 6th section requires a copy of every book to be deposited in the *British Museum* within one month after it shall be first published within the bills of mortality, or within three months if published in any other part of the *United Kingdom*, or within twelve months if published in any other part of the British dominions. This section seems to refer to publications to which the privilege of copyright attaches, and consequently to contemplate the acquisition of this privilege by the first publication of a work out of the *United Kingdom*. But there are provisions in the Act which impose conditions upon a publisher entitled to copyright wholly inapplicable to publications in some distant part of the British dominions; and a non-compliance with these conditions exposing the publisher to penalties which are to be recovered either in a summary way on conviction before two justices of the peace for the county or place where he resides, or by action in any Court of the *United Kingdom*, it seems to me to be clear, notwithstanding the language of the 6th section, that the only publication which entitles a publisher to copyright is that which takes place within the *United Kingdom*, although, when obtained, it exists throughout the whole of the British dominions.

Our attention was called to a local law of *Canada* with regard to copyright, but it was not contended that that it would prevent a native of *Canada* from acquiring an English copyright which would extend to *Canada* as well as to all other parts of the British dominions, although the requisitions of the Canadian law had not been complied with. It is unnecessary to decide what would be the extent and effect of a copyright in those colonies and possessions of the Crown which have local laws upon the subject. But even if the statute of 5 & 6 Vict. applies at all to that case, I do not see how such a copyright can extend beyond the local limits of the law which creates it.

My noble and learned friend upon the woolsack has expressed

an opinion that the statute of 5 & 6 Vict. has extended the privilege of copyright to an alien author who first publishes here, though he himself is resident wholly abroad. With the most sincere respect for his opinion, I cannot help entertaining a doubt whether it is well founded. If any stress is to be laid upon the preamble of the statute, it does not appear to me to differ very widely from that in the statute of *Anne*. One of the objects proposed by the statute of *Anne*, is to encourage "learned men to compose and write useful books." The object of the 5 & 6 Vict. is expressed to be "to afford greater encouragement to the production of literary works of lasting benefit to the world." If, therefore, the statute of *Anne* did not confer the privilege of copyright upon an alien publisher residing abroad (which after the case of *Jefferys* v. *Boosey* it must be taken not to have done), I cannot find anything in the 5 & 6 Vict. which appears to me to warrant the extension of its benefits to such a publisher.

But it is unnecessary to consider this question more fully with a view to the determination of the present case. It is sufficient to say that copyright being now extended to every part of the British dominions the residence of Miss *Cummins*, the authoress of the work in question, in *Canada*, conferred upon her the same title to copyright upon the first publication of her work in *England* as a similar residence in the *United Kingdom* would have done; and, therefore, that in my opinion the decree appealed from ought to be affirmed, and the appeal dismissed with costs.

LORD WESTBURY:—

My Lords, the case of *Jefferys* v. *Boosey* is a decision which is attached to and depends on the particular statute of which it was the exponent; and as that statute has been repealed, and is now replaced by another Act, with different enactments expressed in different language, the case of *Jefferys* v. *Boosey* is not a binding authority in the exposition of this later statute.

In the arguments on the construction of the existing Act it has been admitted (and I think rightly), that the benefit of the copyright which the Act creates, extends to such works only as are first published within the *United Kingdom*. This results from various provisions and conditions contained in the Act, which could not

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possibly be complied with if the first publication were to take place in distant parts of the British empire. But although for the creation of copyright it is necessary that the work be first published within the *United Kingdom*, yet, by the express words of the statute, the copyright, when created, extends to every part of the British dominions. This is the benefit which, by the words of the Act, is offered to authors who shall first publish their works within the *United Kingdom*. The question then arises who are included in the term "authors." The word is used in the statute without limitation or restriction. It must therefore include every person who shall be an author, unless from the rest of the statute sufficient grounds can be found for giving the term a limited signification.

It is proposed to construe the Act as if it had declared in terms that the protection it affords shall extend to such authors only as are natural-born subjects, or, if foreigners, who may be within the allegiance of the Queen on the day of publication. But there is no such enactment in express terms, and no part of the Act has been pointed out as requiring that such a construction should be adopted.

The Act appears to have been dictated by a wise and liberal spirit; and in the same spirit it should be interpreted, adhering, of course, to the settled rules of legal construction. The preamble is, in my opinion, quite inconsistent with the conclusion that the protection given by the statute was intended to be confined to the works of British authors. On the contrary, it seems to contain an invitation to men of learning in every country to make the *United Kingdom* the place of first publication of their works; and an extended term of copyright throughout the whole of the British dominions is the reward of their so doing. So interpreted and applied the Act is auxiliary to the advancement of learning in this country. The real condition of obtaining its advantages is the first publication by the author of his work in the *United Kingdom*. Nothing renders necessary his bodily presence here at the time, and I find it impossible to discover any reason why it should be required, or what it can add to the merit of the first publication.

It was asked in *Jefferys* v. *Boosey*, why should the Act (meaning

the statute of *Anne*) be supposed to have been passed for the benefit of foreign authors? But if the like question be repeated with reference to the present Act, the answer is, in the language of the preamble, that the Act is intended "to afford greater encouragement to the production of literary works of lasting benefit to the world," a purpose which has no limitation of person or place. But the Act secures a special benefit to British subjects by promoting the advancement of learning in this country, which the Act contemplates as the result of encouraging all authors to resort to the *United Kingdom* for the first publication of their works. The benefit of the foreign author is incidental only to the benefit of the British public. Certainly the obligation lies on those who would give the term "author" a restricted signification to find in the statute the reasons for so doing.

If the intrinsic merits of the reasoning on which *Jefferys* v. *Boosey* was decided be considered, (and which we are at liberty to do, for it does not apply to this case as a binding authority,) I must frankly admit that it by no means commands my assent. I abstain from criticising the arguments in detail, for the process could hardly be consistent with the great respect due to judicial opinions delivered by your Lordships.

The sum of the whole reasoning is the conclusion, that a British statute must be considered as legislation for British subjects only, unless there are special grounds for inferring that the statute was intended to have a wider operation.

But by the Common Law of *England*, the alien friend, *ami*, though remaining abroad, may acquire and hold in *England* all kinds of pure personal property, and when a statute is passed which creates or gives peculiar protection to a particular kind of property, which it declares shall be deemed personal property, and does not exclude the alien, why is he to be deprived of his ordinary right of possessing such property or being entitled to such protection? It is said that the statute is intended for the benefit of British subjects; and that is given as the reason for a decision which involves this consequence, viz., that a British subject who has bought an unpublished work from a foreign author residing abroad, and then publishes it in conformity with the statute, shall have no property in that which he has bought and paid for, unless

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the foreign author happens on the day of publication to be bodily present for a few hours within some part of the British dominions. Surely this construction is injurious to the interest of the English subject.

For these reasons, and not on the narrow ground that the foreign authoress of this work crossed the English border, and stayed for a few hours on British ground during the day of first publication, in order that her assigns might escape from the limited views expressed in *Jefferys* v. *Boosey*, I am of opinion that this decree ought to be affirmed, and the appeal dismissed with costs.

LORD COLONSAY :—

My Lords, I concur with all your Lordships in thinking that this appeal ought to be dismissed. I have no doubt at all that, in order to obtain the protection of copyright, the first publication must be within the *United Kingdom*. I have also no doubt that the area of protection extends over the whole British dominions; and thirdly, I have no doubt that an author residing at the time of publication within any portion of the British dominions, although that author may be a foreigner, is entitled to the benefit of the protection.

A more liberal view of the statute has been suggested, and it is an important one; but after the difference of opinion that I have heard expressed with regard to it, not having considered, in my deliberation upon this case, that a judgment upon that point was necessary to the solution of the question now before the House, I respectfully beg to abstain from expressing any opinion upon it, although I can easily see that there is very little benefit to be gained to British authors by refusing to extend the protection of copyright in the manner suggested, because nothing can be more shadowy than a distinction depending upon the circumstance of a few hours' or a few days' residence within some part of the widely-extended dominions of Her Majesty. But it is not upon considerations of that kind that we must decide this case; it is upon the ground that the right only exists by statute, and as I have not directed my attention to that matter, feeling it to be unnecessary

to the decision of this case, I rather abstain from expressing any opinion one way or the other.

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Decree affirmed; and appeal dismissed with costs.

Lords' Journals, 29th May, 1868.

Solicitors for the Appellant: *C. & J. Allen & Son.*
Solicitors for the Respondent: *Taylor, Hoare, & Taylor.*

CATHERINE COLTSMANN . . . PLAINTIFF IN ERROR;

AND

D. CRONIN COLTSMANN . . . . DEFENDANT IN ERROR.

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May 5, 7, 8, 19.

Will—"Heirs of his Body"—"At my Son's death."

A testator was possessed of two estates in *Ireland*, *Flesk Castle* and *Dick's Grove*. The former he held under a lease for lives renewable for ever; the latter he held in fee. In 1833 he made a will, in which he said, "I give, devise, and bequeath to my son *John Coltsmann* all those my *property*, lands, tenements, and premises at and about *Flesk Castle*," together with plate, furniture, &c. "I also devise and bequeath to my son *J. Coltsmann* my lands, tenements, and premises at *Dick's Grove*." All his estates, &c., were made chargeable with an annuity to his wife. He afterwards made a codicil, in which he said, "If it should happen that my son *J. Coltsmann die without heirs of his body* lawfully, &c., in that case, and in default of such heirs, I do hereby devise and direct that my lands, &c., at *Flesk Castle*, and the plate and furniture in my will specified, also my lands, &c., at *Dick's Grove*," all charged with the annuity to his wife, "and also with a reasonable provision, made with my consent, by my son for his wife, payable for her life, shall *at my son's death* descend and be transferred to my grandson *Daniel Cronin*, his heirs, &c., for ever, the heir for the time being to add the name of '*Coltsmann*' to the name of '*Cronin*.'" In the event of the contemplated death of the son without heirs, a charge of £6000 was created in favour of a married daughter. The son never had any child. While in possession he executed disentailing deeds of both estates, and by will devised them to his wife:—

Held, that, reading the will and codicil together, *John Coltsmann* took the estate of *Flesk Castle* in fee, with an executory devise over to *Daniel Cronin*, in the event that happened of *John Coltsmann* dying without heirs of his body living at his death; and, as to *Dick's Grove*, that as the law then

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(1835) stood, the gift was a gift of that estate to *John Coltsmann* for life only, with a contingent remainder to *Daniel Cronin*, in the event of *John Coltsmann* dying without heirs of his body living at his death.

JOHN COLTSMANN the elder was possessed of two estates in the county of *Derry*, one called *Flesk Castle* (on which he resided), held by lease for lives renewable for ever; the other called *Dick's Grove*, which he held in fee. He made his will on the 9th of August, 1833, in which he said, "I give, devise, and bequeath to my son *John Coltsmann* all those my *property*, lands, tenements, and premises at and about *Flesk Castle*, together with the live stock on said lands; also my plate, library, pictures, and furniture. I also devise and bequeath to my son *John Coltsmann* my lands, tenements, and premises, with the appurtenances thereof, situate, lying, and being at *Dick's Grove*, near *Castle Island*, county of *Kerry*." After some pecuniary legacies he gave to his wife *Christina* an annuity of £700 for her life," payable out of the rents, issues, dividends, interest, and profits of my said estates;" also a sum of £1000 sterling, "to be paid to her out of my said estates at the end of the year next after my decease." She was to have the use of such plate as she thought fit, but at her death it was to be restored to the son.

In December, 1833, the testator executed a codicil, in which, after augmenting his wife's annuity to £800, he said, "And if it should happen that my son *John Coltsmann* die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such heirs, I do hereby devise and direct that my lands, castles, tenements, and premises at and about *Flesk Castle*, and mentioned in my said will, together with the plate, furniture, and library in said will specified, also my lands, farms, tenements, and premises situate, lying, and being at *Dick's Grove*, near *Castle Island*, all subject to" the annuity to his wife; "and also with the payment of any reasonable provision made, with my consent, by my son for his wife, to be paid and payable to her during her natural life, shall *at my son's death* descend and be transferred to my grandson *Daniel Cronin*, his heirs, executors, and assigns for ever, the heir for the time being to add the name of *Coltsmann* to the name of *Cronin*. Also, if it should happen that my son *John Coltsmann* die without heirs of his body lawfully begotten, or to

be begotten, in that case, and in default of such heirs, I do hereby give and assign out of the moneys I have at interest, and specified in my said will, the sum of £6000 to my daughter *Mary Godfrey*, for her own use and benefit; . . . . but at the same time the said sum of £6000 shall be subject to and charged with the payment of said annuity to my dear wife *Christina Coltsmann*."

The testator died in 1835, leaving his widow, his son, *John Coltsmann* the younger, and his daughter *Mary*, married to Sir *W. D. Godfrey*, him surviving. He had had another daughter, *Christina*, who had been married to a Mr. *Daniel Cronin*, but had died in her father's lifetime. She left issue several children, of whom "my grandson *Daniel Cronin*," mentioned in the will, was the eldest.

On the death of the testator his son, *John Coltsmann* the younger, entered into possession of the estates, and afterwards executed two disentailing deeds, the one as to *Flesk Castle*, the other as to *Dick's Grove*. He married, and in August, 1848, executed a will by which he devised his real and personal estates to his wife *Catherine*, the Plaintiff in this proceeding in Error. He died in January, 1849, without issue. *Daniel Cronin*, the grandson, assumed in addition to his own the name of "*Coltsmann*," and entered into possession of the two estates.

In June, 1863, *Catherine Coltsmann* brought an action of ejectment to recover from *D. Cronin Coltsmann* possession of these estates, which he claimed to hold under the words of the will of *John Coltsmann* the elder. The cause was tried at *Kerry*, before Lord Chief Justice *Monahan*, when a verdict was entered for the Defendant, subject to an application to the Court to be turned into a verdict for the Plaintiff as to *Flesk Castle*. The judgment of the Court of Exchequer, consisting of the Lord Chief Baron *Pigott* and Mr. Baron *Hughes* (the other Barons, having been counsel in the cause, took no part in the decision), was in favour of the Defendant (1), and this judgment was carried on Error to the Exchequer Chamber, where the Judges, being eight in number, were equally divided in opinion, and so the judgment of the Court below stood affirmed (2). The present proceeding in Error was then brought.

(1) 15 Ir. Com. Law Rep. (N. S.) 171. (2) 17 Ir. Com. Law Rep. (N. S.) 192.

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Mr. *W. M. James*, Q.C., and Mr. *Jessel*, Q.C., for the Plaintiff in Error:—

The judgment in the Court below turned much on the supposed effect of three English cases, *Doe* v. *Frost* (1), *Ex parte Davies* (2), and *Parker* v. *Birks* (3). They do not warrant this decision. In all those cases there was a clear devise in fee, followed directly by an executory devise over. The intention of the testator was plain. It is so here, but in a different way—he intended both the estates to go together, and he gave both to his son, *John Coltsmann* the younger, and to the heirs of his body. The words of the gift of *Flesk Castle* are absolute and unrestricted. The testator coupled that gift with the gift of *Dick's Grove* by words which shewed that he meant that identically the same estate should be taken by his son in both. "I devise and bequeath," he says as to the one. "I also devise and bequeath," he says as to the other. This is plain upon the will. The words of the codicil do not detract from, but strengthen, the force of the gift in the will, for the words "heirs of the body" used there shew that the estate he had intended for the son was really an estate tail, and that *John Coltsmann* the younger was the first of the series of tenants in tail. It is only "in default of such heirs"—that is, heirs of the body—that the estates are to go over. Now the force of these words, "heirs of the body," cannot be denied, and they are not restricted by the words "at my son's death;" the whole ought to be read "at my son's death as aforesaid," that is, "at my son's death without leaving heirs of his body." The words "heirs of the body" are inflexible, to be controlled only by the plainest expression of an opposite intent, *Ex parte Wynch* (4), except where the whole will unmistakeably shews that they were not so meant by the testator. There is no such clear and unmistakeable intention shewn here. On the contrary, it is plain that the testator intended to give everything to the son, chargeable only with the payment of the widow's annuity. In *Walter* v. *Drew* (5) a testator had two sons; he devised to his eldest son, and if his eldest son should happen to die and leave no issue of his body lawfully begotten, then and in that case, and not otherwise, after the death

(1) 3 B. & Ald. 546.
(2) 2 Sim. (N. S.) 114.
(3) 1 K. & J. 156.
(4) 5 De G. M. & G. 207.
(5) Com. 372.

of his said eldest son he gave and bequeathed all his lands to his second son, to have and hold the same, after the death of the eldest, to him and his heirs. The words referring to the time of the death were more positive there than here, yet it was there held that the eldest son took an estate tail by implication, and that the limitation to the second son was a remainder. So again in *James* v. *Ryan* (1), a testator devised lands to his son *A.* and his heirs for ever; and in case *A.* should die without lawful issue, desired that, after his death, all the property should go to his daughter and her heirs; and in case both *A.* and his daughter should die without lawful issue, desired that the property should go to his brothers. Lord Chancellor *Sugden* held that this was an estate tail in *A.*, and not a fee simple with an executory devise over. In both these cases the words referring to the time of death were treated as incapable of affecting the previous devise. The charge in favour of the widow shews that the son was to take more than a life estate, and the power to create a charge for his own wife shews the same thing. If the son took no more than a life estate he could have made no provision for his children, which the testator never could have intended.

Sir *R. Palmer*, Q.C., and Mr. *Joshua Williams*, Q.C., for the Respondent:—

The son took only a life estate in these lands. The use of the words "heirs of the body," employed as they are here, does not warrant a more extended construction of the gift. Those words are not inflexible, but will bend to the clearly-expressed will of the testator: *Roddy* v. *Fitzgerald* (2). As used here, they do not mean heirs generally, but issue—that is, children—of the son; and the rest of the codicil shews that they were such children as should be living at the son's death. The words of the will and codicil taken together prove that the period of the death of the son was that which the testator looked to; and if, at that period, there was no living issue of the son, the two estates were to go to *Daniel Cronin*. That construction is to be deduced from *Nichols* v. *Hooper* (3); and *Stratford* v. *Powell* (4); and in *Toovey* v. *Bas-*

(1) 9 Ir. Eq. Rep. 249.
(2) 6 H. L. C. 823.
(3) 1 P. Wms. 198.
(4) 1 Ball. & B. 1.

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sett (1) a remainder to the issue of grandchildren was prevented from being too remote, because it was made to take effect at their deaths. All the events particularly mentioned in this will are those which must take place in the son's lifetime. His creating a provision for his wife is an example. That is to be only a reasonable provision; nay, more, it is to be made with the testator's consent, which shews a very restricted period of time. The testator did not mean that the estates should be largely burdened; still less, that the estates themselves should go out of the course he had designed for them. He meant that they should go as freely as possible to *Daniel Cronin*, who was to take his name, the name of *Coltsmann*, and so continue the family. To sever the estates, and, still more, to declare that the son took an estate tail in both, would be to defeat this plainly-indicated intention.

In *Doe* v. *Frost* (2), *Ex parte Davies* (3), and *Parker* v. *Birks* (4), the words closely resembled those in the present case; and in the last of them Vice-Chancellor *Wood* said: "There is no case where there has been a clear and distinct gift of an estate in fee, it has been cut down to an estate tail in order to construe subsequent words as creating a remainder." The words of the codicil do not import an indefinite failure of issue; but, in the case of the gift to Lady *Godfrey*, for example, shew the positive intention of the testator to take his son's death as the period which should fix the date of the failure of heirs and of the estate going over. The cases fully warrant this contention. In *Stratford* v. *Powell* (5) there was a devise over "to *J. W.*, *C. B.*, *A. H.*, and their heirs in due succession, as named, with the usual limitations in failure of issue, in and on the decease of *A. B.*," and it was held by Lord *Manners* that this did not import an indefinite failure of issue in *A. B.*, but that the limitation over to *J. W.*, &c., was good by way of executory devise, the words meaning issue living at the time of the decease of *A. B.*, the first taker.

In *M'Enally* v. *Wetherell* (6) the gift was, to my brother *M. M.*

(1) 10 East, 460.

(2) 3 B. & Ald. 546.

(3) 2 Sim. (N. S.) 114. In argument this case was mentioned as a decision of Vice-Chancellor *Kindersley*, but in *Parker* v. *Birks* Vice-Chancellor *Wood* speaks of it (1 Kay & J. 165) as a decision of Lord *Cranworth* when Vice-Chancellor.

(4) 1 K. & J. 156.

(5) 1 Ball. & B. 1.

(6) 15 Ir. Com. Law Rep. 502.

my estate at *T.*, and in case he has no heirs, at the decease of the said *M. M.* my estate and freehold to be given to the first heir at law. *M. M.* had no issue; while in possession, believing himself to be tenant in tail, he executed a disentailing deed and devised the estate to his widow. It was held that the devise to the first heir at law was an executory devise over, and not a remainder after an estate tail. *Jones* v. *Ryan* (1) does not affect this case, for that was an instance of a series of remainders in tail, each introduced by a general failure of issue. *Byng* v. *Byng* (2) shews that the connection of the two subjects, the real and the personal property, may be of importance in deciding on the construction of the will, and the meaning to be given to particular words used in it. That principle ought to be applied here. It will be seen that the testator's intention was to give the personal property to *Daniel Cronin* on his succeeding to the estate. *Toovey* v. *Bassett* (3), and *Hutchinson* v. *Stephens* (4), were referred to in the Court below; there is a third case, *Burke* v. *Annis* (5), which was not mentioned. There the will, which was dated in 1819, was, "To my daughter *Henrietta* I bequeath the house I live in, being No. 11." It was to be placed in trust, and she was to receive the rent only during her life. "In case of *Henrietta's* death without leaving behind her more than one child, the said house No. 11" was to revert to three persons in equal shares; "but if she leaves more than one (be it one, two, or more), they shall all share alike the said property left to their said mother; but suppose that none of them should live to twenty-one years of age the property shall revert to" the three persons previously named. *Henrietta* survived the testator, and died leaving two children; one died in infancy, the other lived to attain twenty-one. It was held that they took an estate in fee simple in possession of the house No. 11. So, in *Shailard* v. *Baker* (6), where a testator had an eldest son by a first wife and two sons and a daughter by a second wife, and devised his land to the two sons, but if either of them or their heirs should sell the land the gift was to be void, and the land was to revert to the whole heirs, and he directed them to pay £3 a year annually to

(1) 9 Ir. Eq. Rep. 249.
(2) 10 H. L. C. 171.
(3) 10 East, 460.
(4) 1 Keen, 240.
(5) 11 Hare, 232.
(6) Cro. Eliz. 744.

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his eldest son: the gift was held to create a fee simple subject to a condition. *Bradley* v. *Cartwright* (1), *Martin* v. *Martin* (2), and *Lloyd* v. *Jackson* (3), were all decisions the same way, and *Green* v. *Green* (4) was an instance where a power to provide for a wife was held exerciseable by a tenant for life notwithstanding such a restriction as appeared to be imposed in the present case. *Houston* v. *Hughes* (5), and *Roe* v. *Pattison* (6), are to the same effect.

It is remarkable that the words "heirs of the body" are not here to be found in the gift itself; they are to be found in the codicil in connexion with the devise over, but there they are combined with the words "at my son's death," and must be construed in conjunction with those words.

The liability to the charge of the annuity to the testator's widow could make no difference in the interest taken by the son. That charge was not payable by him, but payable out of the whole property, no matter who was the possessor of it. There was a similar charge in *Doe* v. *Frost* (7). In *Blinston* v. *Warburton* (8) there was a devise of real estate "to *S.* on condition that she would pay £50 to *B.* by instalments of £10 a year, but in case *S.* dies without issue the land to go to *T.*, or his heirs, in consideration that he pays to *J.*, or his heirs, the sum of £250 within twelve months after the death of *S.*" It was held that the gift conferred a fee simple on *S.*, by reason of the charge of £50, and that the gift over was to take effect upon her death without issue then living.

Mr. *Jessel*, Q.C., in reply:—

Taking the will and codicil together, the gift is to the son and the heirs of his body; the testator contemplated that the son would have heirs of his body, but made a provision in case those heirs should fail that the estate should go over. That was a clear estate tail in the son. The word "heirs" is in the plural number, and points to succession, and dying without "such heirs" refers to a failure in the succession. The word as used here is inflexible, and must have its proper technical meaning.

(1) Law Rep. 2 C. P. 511.
(2) Ibid. 2 Eq. 404.
(3) Ibid. 1 Q. B. 571; affirmed 2 Ibid. 269.
(4) 2 J. & Lat. 521.
(5) 6 B. & C. 403.
(6) 16 East, 221.
(7) 3 B. & Ald. 546.
(8) 2 K. & J. 400.

May 19. THE LORD CHANCELLOR (Lord *Cairns*):— 1868

My Lords, on the construction of the will of the testator, if it stood alone and apart from the codicil, no reasonable doubt could, I think, be entertained. He had an estate called *Flesk Castle,* held for lives renewable for ever, and he had live stock, a library, pictures, plate, and furniture, in and about the castle. He had also an estate in fee simple called *Dick's Grove.* His son, *John Coltsmann,* under whom the Appellant claims, was his heir-at-law. In this state of things he gave, by his will, dated the 9th of August, 1833, to his son *John Coltsmann* "all those his *property,* lands, tenements, and premises, at and about *Flesk Castle,* together with the live stock on said lands; also his plate, library, pictures, and furniture." COLTSMANN v. COLTSMANN.

Although there are in this devise, as your Lordships will observe, no words of limitation, yet the word "property" would have been sufficient, even before the *Wills Act,* to carry the absolute interest; and *John Coltsmann* would, if he took under the will, be entitled to *Flesk Castle* and the personalty absolutely. As to *Dick's Grove,* the testator devised it to his son, *John Coltsmann,* without words of limitation, and without any words to carry the absolute interest; and *John Coltsmann* would, if he took *Dick's Grove* under the will, take it as tenant for life only.

To this will a codicil was made, dated the 6th of December, 1833, and by this codicil *Flesk Castle* and the personalty in it, and *Dick's Grove,* were given or limited over, in a certain event, in terms which occasion the controversy in the case. The learned Judges in the Courts below, or most of them, appear to have thought that, whatever construction might be given to these words of gift or limitation over, it was in a high degree desirable, if not absolutely imperative, to find a construction which would operate in the same way both on *Flesk Castle* and on *Dick's Grove.* I must own, my Lords, that I am unable to view the case in this light. The words of gift or limitation over are the same as to both estates, and it may be desirable, or necessary, to give to these words in both cases the same meaning. But the effect which these words will have upon the estates to which they are applied is a different matter. They would naturally have the same effect and operation if applied to two estates both previously given in fee

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simple, but they may, and *à priori* we may naturally expect they will, have a different effect when applied to an estate in fee simple from the effect they will have when applied to an estate for life. The words in the codicil, then, are these :—[His Lordship read them, see *ante*.]

The question as to *Flesk Castle* is, do these words cut down the estate in fee, or *quasi* fee, previously given to an estate in tail or *quasi* tail? Or, on the other hand, do they amount to an executory gift over in the event of *John Coltsmann* dying without heirs of his body living at the time of his death?

In support of the argument for cutting down the gift in fee simple to an estate tail, it is said, in the first place, that the words "dying without heirs of the body and in default of such heirs," point, not to the non-existence of one heir, but to the failure of a succession of heirs. In the second place, it is said that we cannot suppose that the testator intended that if his son should leave an infant child who should die under age, the estate should not go over to *Daniel Cronin* as much as if the son died without issue living at his death. And it is argued, thirdly, that if the estate of *John Coltsmann* remained during all his life subject to an executory devise he would not be able in his lifetime to provide for his issue as he might do by means of an estate tail.

As to the first of these arguments, I cannot admit that the words "die without heirs of the body," are necessarily inflexible. They are technical words, and they are strong words, but they are, notwithstanding, words the technical meaning of which may on construction be controlled by the context. A gift over "if *A.* shall die without heirs of his body at his death, or living at his death," would imply a failure of heirs of the body at that *punctum temporis* only; and the question in this case is, does the context limit the words "heirs of the body" in the same way?

The second argument proceeds upon an *à priori* assumption of what the testator would naturally intend; which cannot be allowed to weigh against the proper construction of the words which he has used.

And as to the third argument, if the testator can be supposed to have contemplated a provision to be made by the son for his issue generally, he must be supposed to have contemplated cutting off of

the entail, for in no other way could provision for his issue generally be made, a proceeding which would put an end to the gift over altogether.

I turn, therefore, my Lords, to the considerations which satisfy my mind that as to *Flesk Castle* the codicil created an executory devise operating upon the absolute interest given by the will.

In the first place, reading the codicil without the parenthetical or superfluous expressions, it runs thus: "If *John Coltsmann* die without heirs of his body, and in default of such heirs, I direct that *Flesk Castle*, with the plate, furniture, and library, shall at my son's death descend and be transferred to *Daniel Cronin*, his heirs, executors, and assigns for ever."

These words appear to me to be clear and distinct, and the expression "at my son's death" appears to me to operate on every part of the sentence, and to point to a succession to *John Coltsmann*, which, if it arises at all, is to open upon *John Coltsmann's* death, and at no other time. The exigency of the words was attempted to be surmounted by reading them "at my son's death as aforesaid;" that is, "at my son's death without leaving heirs of the body." But this construction, in the first place, interpolates words which are not found in the will; and, in the next place, it is open to the even more serious objection, that in an unbroken sentence it attempts to fix the meaning of the first part, and then to square the second part with the meaning so fixed, in place of reading the whole, and interpreting the whole, together.

A farther reason, my Lords, for reading this as an executory devise appears to me to be that you thereby preserve and carry over the personalty in *Flesk Castle* along with the estate, which the testator seems to have desired to do; whereas, if the codicil is read as creating an estate tail in *Flesk Castle*, the gift over of the personalty, on an indefinite failure of issue, would be inoperative.

I have also to point out to your Lordships that *Flesk Castle* is to go over charged with the payment of any provision made by the son for his wife with the testator's consent. How this consent was to operate or be given is not clear; but the importance of the words consists in this, that they shew that the testator thought that the gift over to *Daniel Cronin* was the only thing against which the provision for his son's wife had to be protected. Now,

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if the provision were made by the son by cutting off the entail, no protection as against the gift over would be required. And if the provision were made without barring the entail, it would require to be protected against the heir in tail as well as against *Daniel Cronin.*

Finally, my Lords, you observe the sum of £6000 to *Mary Godfrey* is given in the same event of *John Coltsmann* dying without heirs of his body. The gift is a singular one, and not very intelligible; but it is, at all events, clear that a personal benefit to *Mary Godfrey* was intended, and not the contingent or postponed benefit which would result from a legacy to take effect, if it could take effect at all, on the indefinite failure of issue of the son.

These considerations, my Lords, satisfy my mind that as to *Flesk Castle* the effect of the will and codicil together was to create an executory devise over in the event which has happened, of *John Coltsmann* dying without heirs of his body living at his death; and that, therefore, as to *Flesk Castle,* the judgment appealed against is right.

My Lords, the observations which I have made up to this point apply to *Flesk Castle.* As to *Dick's Grove,* the words of limitation over are the same, and, in my opinion, must be construed in the same way as in the case of *Flesk Castle.* But the estate of *John Coltsmann* in *Dick's Grove,* given by the will, was an estate which, as the law then stood, was an estate for his life only. The codicil, according to the construction I put upon it, says in effect:—"If *John Coltsmann* die without heirs of his body living at his death, I give *Dick's Grove* to *Daniel Cronin* absolutely." I agree with Mr. Justice *Christian,* that this is a remainder limited to *Daniel Cronin,* supported either by the life estate of *John Coltsmann,* and contingent on his dying without heirs of his body living at his death; or else a vested remainder, supported by an estate tail, in *John Coltsmann,* the devise to him by the will being enlarged by the codicil to an estate tail. My own opinion is, that the estate limited to *Daniel Cronin* is a contingent remainder, supported by a life estate in *John Coltsmann;* but whether a contingent or vested remainder, in either case the fee was acquired by *John Coltsmann*—in the one case, by the destruction of the contingent

remainder, in the other case, by the deed under the *Fines and Recoveries Act.*

The construction which treats this as a contingent remainder is, perhaps, open to the observation that it makes the gift over to *Daniel Cronin* depend on *John Coltsmann's* dying without heirs of his body living at his death; whereas nothing is given to such heirs, if there should be any. In this particular case, *John Coltsmann* being the heir-at-law, this remark would apply with less force, as he would have the undisposed of fee, and thus be able to provide for his issue. But in any case, whatever authority there may be for holding that before the *Wills Act* a general devise to *A.*, followed by a devise over if *A.* die without heirs of his body, or without heirs of his body living at his death, may be expanded into an estate tail, in order to provide for heirs of his body, I know of no authority for expanding it into a fee simple.

In my opinion, therefore, the judgment of the Court below is right as to *Flesk Castle;* but as to *Dick's Grove*, (or rather those parts of the estate in which there is no term of years subsisting and outstanding,) I think a verdict should be entered for the Plaintiff, and I think there should be no costs of suit, or of defence, and no costs of the appeal.

LORD CRANWORTH:—

My Lords, as has been pointed out by my noble and learned friend on the woolsack, different considerations affect different parts of the testator's property. As to *Flesk Castle*, the language of the will, looking to the will alone, would have given to *John Coltsmann*, the testator's son, an estate in fee simple, if his, the testator's interest, had been that of a fee simple proprietor. But that was not his interest. He held originally on a lease for lives, but a lease, on the tenure so common in *Ireland*, for lives renewable for ever. He had, therefore, what is generally called a *quasi* fee simple in this property, and by the will the son took a similar interest. The question is, how that estate was affected by the codicil, whereby the testator directed that if his son should die without heirs of his body, then the said castle and lands should, at his son's death, descend and be transferred to his grandson, *Daniel Cronin*, his heirs and assigns for ever.

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The construction must be the same as if the testator had been seised in fee; and in such a case both principle and authority are clear in favour of the construction which gives to the first taker an estate in fee simple defeasible on the death of the son without issue at his death. This was the construction put on the language of the wills in *Doe* v. *Frost* (1), *Ex parte Davies* (2), and *Parker* v. *Birks* (3). The only difference between the language of the wills in those cases, and the codicil now before us, is, that here the words are "*heirs of the body*," whereas in the cases referred to the phrase was in two of them "*issue*," and in the other "*child or children of his body lawfully begotten*." But this distinction is not material, for in all those cases the question was, whether the estate of the devisee was cut down to an estate tail. It was, therefore, assumed that the words were to be construed as words of limitation, *i.e.*, as if they had been *heirs of the body*. Unless they were to be construed as words of limitation, no question as to an estate tail could have arisen, and I can see no difference in such a case between the use of the strictly technical words "heirs of the body," and the use of words assumed and admitted to have the same meaning.

Looking, therefore, to the *Flesk Castle* estate only, the question seems to me to be decided by authority. *Daniel Cronin*, on the death of *John Coltsmann* the younger without issue living at his death, took an estate in fee simple in *Flesk Castle*. But as to *Dick's Grove*, I arrive at a different conclusion. As to this estate, I think that *John Coltsmann*, the son, took an estate for life only, with a contingent remainder, in the event of his having no heir of his body at his death, to *Daniel Cronin* in fee.

I come to this conclusion on the following grounds:—I read the will and codicil together as if they constituted but one instrument. If the language had been, "I give to my son *John* the lands of *Dick's Grove* for life, and if he leaves no heir of his body living at his death, then the said lands shall, at his death, descend and be transferred to *Daniel Cronin* and his heirs," there would then, I suppose, be no question but that this would have been a life interest in the son, with a contingent remainder to *Daniel Cronin* in

(1) 3 B. & Ald. 546. (2) 2 Sim. (N. S.) 114.
(3) 1 K. & J. 156.

fee. Now the only difference between the words I have here suggested, and those actually found in the will and codicil before us, is, that the estate given to the son is not expressed to be for life, but is given in language which, as the law then stood, conferred on him no more than a life estate. I can discover no substantial difference between these two cases. The construction must, I think, be the same as if the testator had, in terms, expressed that which the law presumes him to have intended, and declares to be the legal meaning of the language he has used. I cannot think that there is either principle or authority for holding that the testator intended to give to his son an estate larger than the words he has used would, as the law then stood, naturally import, and for so holding, in order to make the gift over operate as as an executory devise, and not as a contingent remainder. It is immaterial to consider whether the words of the codicil operated to convert the life estate into an estate tail; for even if that were so, the practical result would be the same.

It was strongly pressed at the Bar that the testator, when using the same words in his codicil for disposing after his son's decease of his two estates of *Flesk Castle* and *Dick's Grove*, can hardly have intended that the two estates should pass to different devisees. But I find it impossible to come to a conclusion founded on any speculation as to what the testator may have had in his mind, except so far as it can be ascertained from the language he has used. And the anomaly, if it be an anomaly, of the two estates going to different devisees, arises, it must be observed, not from the language of the codicil, which is the same as to both estates, but from that of the will, which was not the same as to *Flesk Castle* and *Dick's Grove*, and which, according to the law as it stood previously to the passing of the *Wills Act* of 1837, gave to his son an estate in the nature of a fee simple in *Flesk Castle*, and an estate for life only in *Dick's Grove*.

For these reasons, I think the judgment below was right as to *Flesk Castle*, and wrong as to *Dick's Grove*.

LORD CHELMSFORD:—

My Lords, it is unnecessary to refer to authorities to prove that under the will in question, *John Coltsmann* the younger took the

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entire interest of the testator in the property of *Flesk Castle*, and only an estate for life in *Dick's Grove*.

The will and codicil must be read together. I have no doubt that the intention of the testator was that the two estates should not be separated, and that they should go together to *Daniel Cronin* in case *John Coltsmann* should die without heirs of his body; but if *John Coltsmann* left heirs of his body, that *Daniel Cronin* should not have the estates. The general intention of the testator would be effected by giving an estate tail to *John Coltsmann*, both in *Flesk Castle* and in *Dick's Grove*; although, of course, the remainder to *Daniel Cronin*, whether vested or contingent, would then be at the mercy of the tenant in tail. But it is a clear rule in the construction of a will, that you cannot reject any words if they have an intelligible meaning, and, therefore, the words in the codicil "at my son's death" in the devise over of *Flesk Castle* and *Dick's Grove* in the event of *John Coltsmann* dying without heirs of his body, must, if capable of application, be read as expressive of the testator's intention.

Taking the will and codicil together, there is a devise to *John Coltsmann* of *Flesk Castle* in *quasi* fee, and of *Dick's Grove* for life, with a devise over to *Daniel Cronin* at the death of *John Coltsmann*, in the event of *John Coltsmann* dying without heirs of his body; which, it appears to me, must be understood to mean at the time of his death.

If the words "at my son's death" had not been in the devise contained in the codicil, there would have been little difficulty in holding that the words "if it should happen that my son, *John Coltsmann*, die without heirs of his body" would, in the case of *Flesk Castle*, have cut down the estate in fee to an estate tail; and in the case of *Dick's Grove*, have enlarged the life estate into an estate tail. But reading the clause with the words "at my son's death," and collecting the testator's meaning from the whole of the clause, it appears that the only event contemplated by the testator, upon the happening of which *Daniel Cronin* was to have both the estates, was the death of *John Coltsmann* without heirs of his body then living. Probably, if the testator had been asked whether in the event of his son leaving a child who survived him, and afterwards died without issue, he meant that the estates

should not go to *Daniel Cronin*, he would have answered in the negative. But this, of course, can be only conjecture, and in construing a will we are not at liberty to guess what a testator's intention would have been upon the happening of an event which appears not to have been in his contemplation. He has chosen to make use of technical language to express his intention, and the appropriate meaning of that language must, in the absence of anything to control it, be taken to have been the intended one.

The Judges in *Ireland* in forming their opinions, proceeded upon the highly probable presumption that the testator meant the two estates of *Flesk Castle* and *Dick's Grove* to go inseparably in the same direction; and under that impression they were influenced to put a construction upon the testator's expressions which would adapt them alike to both the estates. But we can only collect the meaning of a testator from the language which he uses, and if this is of a technical character we must not depart from its technical import to satisfy a conjectural intention. If upon the present occasion a strict adherence to the meaning of words will have the effect of giving a different course of succession to the two estates, this will follow from a far safer mode of construing the will than either by rejecting words, or by refusing to apply the proper construction to legal language.

As to *Flesk Castle*, I am of opinion that the words "if it should happen that my son *John Coltsmann* die without heirs of his body," did not cut down the previous estate in fee given to *John Coltsmann*, but that the devise to *Daniel Cronin* at *John Coltsmann's* death without heirs of his body, was a good executory devise mounted upon the previous fee, which would either take effect or fail upon *John Coltsmann's* death. And of course this executory devise could not be defeated by any act of *John Coltsmann*. As to *Dick's Grove*, the words in the codicil "if it should happen that my son *John Coltsmann* die without heirs of his body," enlarged the life estate given to *John Coltsmann* by the will to an estate tail, and the devise over to *Daniel Cronin* in the event of *John Coltsmann* having no heirs of his body at his death was a contingent remainder and barrable by *John Coltsmann*. Even if it had been an executory devise, following as it does upon

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an estate tail, it would have been equally within the power of the tenant in tail.

It was urged as an objection to a construction of the will which would separate *Flesk Castle* and *Dick's Grove* from each other, that it could only be by giving a different interpretation to the same words in the same clause of the will. But this is not so. The meaning of the words "heirs of the body" is not changed, but a different effect is given to them in their application to different estates. If the words were not qualified by the words "at my son's death," they would have produced the same result by reducing one estate, and enlarging the other to an estate tail. But as, with that qualification, they do not import an indefinite failure of heirs of the body, they cannot by implication reduce the estate in fee in *Flesk Castle* to an estate tail, and as the ordinary operation of the words with respect to the failure of "heirs of the body," would be to enlarge the estate for life in *Dick's Grove* to an estate tail, this effect is not prevented by the devise to *Daniel Cronin* in the event of the death of the tenant in tail without leaving heirs of his body, which is merely a gift over upon the natural determination of the estate tail at a particular period.

Upon these grounds, I think the judgment appealed from ought to be reversed, and a verdict entered for the Appellant for *Dick's Grove*, and for the Respondent for *Flesk Castle*.

LORD COLONSAY concurred.

Judgment appealed from, in part affirmed, in part reversed; remit, with declaration.

Lords' Journals, 19th May, 1868.

Solicitors for the Appellant: *Eyre & Lawson.*
Solicitor for the Respondent: *Charles Wilkin.*

MICHAEL HENRY CONOLLY . . . . . APPELLANT;

AND

CHARLES P. LUSCOMBE, EXECUTOR OF THOMAS P. LUSCOMBE, DECEASED . . RESPONDENT.

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AND, BY REVIVOR,

L. MOONEY, ADMINISTRATOR WITH THE WILL ANNEXED OF M. H. CONOLLY, DECEASED APPELLANT;

AND

RANDOLPH ROBINSON, ADMINISTRATOR DE BONIS NON, WITH THE WILL ANNEXED, OF THOMAS P. LUSCOMBE, DECEASED . . RESPONDENT.

Practice—Costs.

M. H. C. instituted a suit in Chancery in *Ireland*, against *C. P. L.*, executor of *T. P. L.*, in respect of an act done by *T. P. L.* in his lifetime. The suit was dismissed. *M. H. C.* appealed to this House against the dismissal. Before the appeal could be heard, both *M. H. C.* and *C. P. L.* died. *R. R.* took out letters of administration to *C. P. L. de bonis non* of *T. P. L.*, and *L. M.* took out administration, with the will annexed, to *M. H. C.* *L. M.* obtained, (but not until after a lapse of more than one year from the date of the dismissal,) in the Court of Chancery in *Ireland*, an Order to revive the suit as against *R. R.*, and afterwards presented a Petition to this House that the appeal might stand revived as between himself and *R. R.* as administrator *de bonis non*. *R. R.* objected, under these circumstances, to the competency of the appeal. The Appeal Committee ordered the objection to be argued at the Bar of the House:—

Held, that it was too late to take that objection here, and that the proper course for *R. R.* would have been to resist the Order for revivor made in the Court of Chancery in *Ireland*.

The appeal itself was heard and dismissed with costs, from which would have been deducted the costs, if any, of presenting the objection of want of competency to the Appeal Committee.

IN the year 1836 *Michael Henry Conolly* borrowed from *Thomas P. Luscombe* a sum of £1500, and gave as a security a mortgage on certain houses in *Dame Street, Dublin*. He afterwards borrowed a sum of £350, which was secured by a farther mortgage on the same houses. He afterwards borrowed a farther sum of £500, for which he deposited with *Thomas P. Luscombe* shares in the *Wicklow Copper Mining Company*. These shares amounted, in 1840, to

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the number of 100. They were sold by *Thomas P. Luscombe* in that year. The substantive question in the cause had been whether *Thomas P. Luscombe* had been authorized by the dealings between himself and *Conolly* to sell these shares until after the sale of the houses, and then only for the purpose of making up a possible deficiency.

Thomas P. Luscombe died in March, 1855, having by his will appointed his son, *Charles P. Luscombe*, his executor. In April, 1855, *Conolly* filed his Cause Petition against *Charles P. Luscombe*, complaining of the sale of the shares, and asking for an account. On the 30th of June, 1856, there was a general Order of dismissal of the Cause Petition without costs. This order was brought up by appeal to the House of Lords on the 16th of February, 1857. The cause was set down for hearing in June of that year. It was not then heard, and *Michael Henry Conolly* died on the 25th of November, 1857, having previously made a will, under which *Laurence Mooney* was appointed his residuary legatee. *Charles P. Luscombe* died on the 24th of June, 1858, and letters of administration of the estate of *Thomas P. Luscombe*, unadministered by *Charles P. Luscombe*, were granted to *Randolph Robinson*. The executors of *Michael Conolly* having renounced, administration with his will annexed was, on the 31st of August, 1861, granted to *Laurence Mooney*, who, on the 5th of February, 1862, filed a Petition in the Court of Chancery in *Ireland*, setting forth the above facts, and praying that *Randolph Robinson* might be ordered to shew cause why the aforesaid suit and proceedings should not be revived against him as administrator of the goods and chattels of *Thomas P. Luscombe* unadministered by *Charles P. Luscombe*, deceased, and that the suit might be revived, and be in the same plight and condition as at the time of the death of *M. H. Conolly*.

On the 9th of March, 1864, an Order was made reciting the Petition, and ordering "that the said matter, wherein *M. H. Conolly* was Petitioner, and *Charles P. Luscombe*, executor of *Thomas P. Luscombe*, deceased, was Respondent, be revived, and the same, and all proceedings thereon had, to stand in the same plight and condition as the same were in at the time of the said abatement of the said Petition by the death of *M. H. Conolly*, and that the said matter be now carried on and prosecuted by *L.*

Mooney, against *R. Robinson*, as such administrator as aforesaid, in like manner as if the said *R. Robinson* had originally been a Respondent in the said matter."

On the 12th of May, 1864, *Mooney* presented to this House his Petition praying that the Cause and appeal might stand revived in the name of the Petitioner, in the place of *M. H. Conolly*, deceased; that he might be at liberty to adopt the proceedings taken by *Conolly*, and carry on the same against *Randolph Robinson*, as administrator, &c.

The Respondent took objection to the competency of the appeal, the objection was presented to the Appeal Committee, and ordered to be heard with the cause itself at the Bar of the House. When the cause was called on

Mr. *Druce*, Q.C. (Mr. *Fred. P. Morris* was with him), for the Respondent:—

The objection is, that the revivor is against the administrator *de bonis non*, and that this is not a continuation of the original suit. That was a suit against the executor of the original testator, and there is no privity between the decree then made and the administrator *de bonis non*. The Cause Petition was against the executor as representative of the original testator. If a decree had been made for the Plaintiff in that suit, it would have been against the assets of that testator. During the period that elapsed between such a decree and the appeal it would only have been in respect of such assets of the testator as came to the hands of the executor that any process could have been issued. There is nothing to shew that any such assets exist. [THE LORD CHANCELLOR:—You cannot be heard to say that the first executor fully administered, for you have taken out letters of administration *de bonis non*.] There were no proceedings taken in the original suit against the administrator in the Court below; all that was done was to get an order of revivor long after the original suit had actually been taken out of the Court below and brought up to this House.

This appeal is out of time. By the 30th section of 13 & 14 Vict. c. 89, no appeal to this House against an Order of the Court of Chancery in *Ireland* shall be brought, unless with the special leave of the Court, after the period of one year from the date of

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the Order. More than a year elapsed between the decree and the application to revive, and no such special leave was granted here, unless this Order to revive as against the administrator *de bonis non* can be considered a continuation of the original suit. [THE LORD CHANCELLOR:—Either it is a proper continuation of the original suit, or it is not. If it is, the appeal is in time; if it is not, you should have moved in the Court below to discharge the order.]

Mr. *Chitty*, for the Appellant, was stopped as to this point; but was heard on the appeal itself, which depended entirely on evidence as to the dealings between the parties.

The Respondent's counsel were not called on to support the decree on the merits.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, it will be proper that I should remind your Lordships, in the first place, of an objection which was taken in this case on the part of the Respondent to the competency of the appeal. The nature of that objection was this. The original proceeding in the Court of Chancery in *Ireland* was directed against Mr. *Charles Popham Luscombe*, who was the executor of Mr. *Thomas Popham Luscombe*, whose acts were complained of in the proceedings in *Ireland*. The Cause Petition went on to a hearing, and was dismissed as against that Defendant. He was standing in a representative character, and, I apprehend, that if the result had been different, and if the decree had been made against him, and if what afterwards took place had then taken place, namely, his death, the course for the Plaintiff to pursue would have been to institute proceedings in the nature of proceedings of revivor against the representative of the executor as to whom the decree had been made, or against the person who had become the representative of the original testator, if the representative of the executor did not carry on the chain of representation. The suit, however, having been dismissed, wha took place was this:—*Charles Popham Luscombe's* death having broken the chain of representation, one *Randolph Robinson* took out letters of administration *de bonis non* to the person originally concerned in the cause, the testator. And proceedings in revivor were instituted in *Ireland* against *Randolph Robinson*, and the suit

was revived as against him. Now it was argued at your Lordships' Bar on his behalf that he was not in privity with the original decree in such a way as that the proceedings in *Ireland* up to the point of that decree should be held binding upon him, without some original proceeding against him which might be taken in the nature of a revival of the suit. And it was said that the appeal, as it now stands, being directed against him who had not been bound directly by the original decree, was out of time, because the Act of Parliament limits appeals from the Court of Chancery in *Ireland* to a period of one year. My Lords, the sufficient answer to that is, that if the argument of the Respondent is well founded, and if it was not sufficient to proceed against him simply by order to revive the suit in *Ireland*, the objection might have been taken there. The Respondent ought then to have taken proceedings to resist the revivor, and to require, if so advised, that some original proceedings should be instituted against him. Not having done that, he has come in and attached himself to the fate of the suit, whatever it may be, and it is not competent, I apprehend, to him now to make any objection of this nature at your Lordships' Bar. His Lordship then delivered judgment on the case itself, and moved that the appeal be dismissed with costs.

LORD CRANWORTH expressed his full concurrence with the motion, but observed that as an improper objection was made to the competency of the appeal, if any costs had been incurred before the Appeal Committee on account of that objection, it might be right to consider whether as against the costs of the appeal there ought not to be a set-off of any costs which the Appellant was put to by that objection as to competency.

LORD CHELMSFORD and LORD COLONSAY concurred.

[With reference to the suggestion of Lord *Cranworth*, it was stated that no costs had been incurred in the Appeal Committee.]

Decree of Court below affirmed. Appeal dismissed with costs.

Lords' Journals, 26th May, 1868.

Solicitor for the Appellant: *H. Cruse.*
Solicitors for the Respondents: *Walker & Martineau.*

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LORD MUSKERRY AND J. P. BEAVAN . . APPELLANTS;

AND

THE HONOURABLE DORCAS SKEFFINGTON, R. FOSTER DUNLOP, R. D. SPREAD, AND OTHERS . . . . . } RESPONDENTS.

Trusts—Practice.

Two persons were, under a deed of settlement after a marriage, made assignees of a life policy upon trusts stated in the settlement, for the benefit of the younger children of the marriage. The husband died intestate. The widow took out letters of administration, and instituted an administration suit, to which the trustees were not made parties, but in which the Court of Chancery in *Ireland* was asked to grant, and did grant, an Order for the payment of the policy money into Court. The insurance office, knowing of the assignment of the policy, refused to obey the Order, and the trustees, on being informed of it, protested against it, and refused to sign receipts for the money. The solicitors for the Plaintiff in the administration suit wrote to them, asking them to give up the trust. They refused, and they again refused to sign the receipts for the payment of the money under the administration suit. A Petition, in the names of the younger children, was then presented to the Lord Chancellor of *Ireland*, representing that the trustees had declined to act in the trust, and it was prayed that they might be removed, and other persons be appointed in their stead. An Order to this effect was made:—

Held, on appeal by the trustees, against these Orders, that these proceedings were altogether irregular; and the cause was remitted, with special instructions.

The costs of the trustees were ordered to come out of the funds of the trust.

CERTAIN policies on life, among which was one in the *Royal Exchange Assurance Company* for £1846 3*s.* 1*d.*, and another in the *Provident Assurance Company* for £10,000, had been effected to secure provision for the younger children of Lord *Massareene*. They were assigned to the two Appellants as trustees, under a deed of trust executed on the 14th of October, 1854, in which the Appellants were named as trustees, but which they did not execute. The deed was executed by the Viscount and Viscountess *Massareene*. The Viscount died intestate on the 28th of April, 1863, leaving his Viscountess and seven younger children (of

whom the Honourable *Dorcas Skeffington* was the eldest) him surviving. On the 8th of June, 1863, the Viscountess, who had previously taken out letters of administration, presented a Petition to the Court of Chancery in *Ireland*, under the 13 & 14 Vict. c. 89, and the 15 & 16 Vict. c. 55, for administration of the personal estate of her deceased husband. On the 7th of July the children were made wards of Court. On the 25th of July the Master (*Litton*) made rulings in the Cause Petition matter by which it was directed that the insurance companies (which were not made parties to the proceedings) should invest the sums secured, to the credit of the Cause Petition matter, to be dealt with according to the rights of the Petitioners, and it was directed that the Viscountess *Massareene* should join in the receipts to the insurance companies when the sums secured were invested. By an Order of the same date the companies were ordered to bring into Court the amount of the policies. The Appellants were not made parties to these proceedings, and had no notice of them. The *Royal Exchange Company* obeyed this Order and brought the money into Court. The *Provident Company*, acting on a knowledge of the assignment of the policy to the Appellants, did not obey the Order.

On the 18th of September, 1863, the solicitors of Viscountess *Massareene* wrote to the solicitors of the Appellants requesting them to get the Appellants to sign receipts for these sums, and received an answer to the effect that sums intended as a provision for children ought not to be brought into Court in a mere administration suit to which the trustees were not parties. Other letters of a similar kind passed between the parties. In a letter dated the 30th of October, 1863, Lord *Muskerry* declared that he should be guided in his conduct by the advice of Mr. *Beavan*. On the 3rd of November, 1863, the solicitors of the Viscountess wrote a letter detailing the circumstances of the application to the Court of Chancery, and the Orders of the Court, and renewing their demand for the signing of the receipts. On the 19th of November, Mr. *Beavan* himself answered the communication in a letter, in which he described the course pursued as "irregular," and went on to say, "It would lead to no useful result that we should continue a correspondence which has already become peculiarly disagreeable, and

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I therefore beg you will consider this letter as a final and positive refusal on my part to sign the receipt, or the authority, until I am either directed by a competent tribunal, or advised by my own Equity Counsel, that I may do so without risk or responsibility." Application was then made to the Appellants to relinquish the trust. They declined to do so.

A petition in the names of the children was presented to the Court of Chancery in *Ireland*, under the *Trustee Acts* of 1850 and 1852, in which it was submitted "that the letters of the said Lord *Muskerry* and *John Phillips Beavan* are a refusal on their part to act" . . . "that the foregoing letters are a sufficient refusal on the part of the trustees to act under the trusts of the said deed, and that the objections to sign the receipts for the amount of the money secured by the said policy are evasive and unsatisfactory." The Petition then alleged that it "was very inconvenient that one of the trustees (Lord *Muskerry*) should be permanently resident in *England*, and the other (Mr. *Beavan*) in *France*;" and the Petitioners submitted that they were now entitled to have new trustees appointed in the place of the said Lord *Muskerry* and *J. P. Beavan;* and they were advised that they could not institute any proceedings in *Ireland* against those trustees to have the sum in question brought into Court, as both were resident out of its jurisdiction. The Petitioners alleged their desire to appoint *R. F. Dunlop* and *R. D. Spread* as the new trustees; and the Petition concluded with a prayer to that effect.

On the 5th of December, 1863, an Order was made in accordance with the prayer of this Petition.

When this Order was brought to the knowledge of the Appellants, they wrote, declaring that it had been obtained without due notice to them; that "they had not declined to act, and had never expressed any intention, and had not then any intention, to do so;" and that they did not consent to the money being paid into the *Bank of Ireland*, or to the Petitioners' solicitors. The Appellants afterwards presented a Petition to the Court of Chancery in *Ireland* praying to be reappointed trustees, which Petition was heard by the Lord Chancellor, and on the 28th of May, 1864, dismissed with costs.

The money was paid by the *Provident Assurance Company* into

the Court of Chancery in *England* under the *Trustees Relief Act*, and a Petition was subsequently presented by the children to that Court to have it paid to the Accountant-General of the Court of Chancery in *Ireland* to the credit of the cause there. An Order was made on the 27th of July, 1864, to transfer the money to the Accountant-General of the Court of Chancery in *Ireland*, to the credit of the Cause Petition of *Massareene* v. *Skeffington*, "and to the separate credit of the matter of the trusts of the policy," &c., and other directions were given in conformity therewith.

The present appeal was brought against the two Orders of the Lord Chancellor of *Ireland* made on the 5th of December, 1863, and the 28th of May, 1864. Lord *Muskerry* died during the proceedings.

Mr. *Kay*, Q.C., and Mr. *McNaghten* (Mr. *Swanston* was with them) for the Appellants:—

The whole proceedings here are irregular, and the two Orders cannot be sustained. While the trust existed there was no jurisdiction in the Court of Chancery in *Ireland* to order the amounts of the policies to be paid into Court under an administration suit to which the trustees were not parties, nor was there any power in the Court in such a suit to remove the trustees from the trust while they were willing to act in it. They were willing to do so; and so far from declining to act in the trust, they had declined to say that they would not act in it.

Mr. *W. M. James*, Q.C., and Mr. *F. Waller*, for the Respondents:—

There might not be any distinct declaration of an intention to decline acting in the trusts, but the whole correspondence amounted to that. The trustees would not take part in procuring the money from the insurance offices and investing it for the children, but absolutely declined to sign receipts by which that purpose might have been effected. Under such circumstances the younger children, whose interests were suffering from the non-payment of these moneys, had nothing to do but to ask for the removal of trustees who thus obstructed the execution of the purpose for which they had been appointed.

Mr. *Kay* was not called on to reply.

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THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, I very greatly regret that in this case, owing to a departure from the established practice of the Court of Chancery, and owing to the irregularity of the parties to the proceedings which were commenced in the Court of Chancery in *Ireland*, in this case, great expense has been incurred by an Order which your Lordships are now called upon to set right, and which I think you will find it absolutely necessary to set right; and yet with regard to which, the costs, I greatly fear, will not fall upon those who properly ought to be made answerable to pay them.

My Lords, the case is one of the simplest which can well be imagined:—[His Lordship stated the facts, and referred to the order to bring the money into Court.]

My Lords, if to that Petition the trustees of those policies had been made Defendants, and if the policy moneys had been carried over to a separate account of the settlement of 1854, it would have been perfectly regular. In the course of the proceedings the trustees, most probably, would have been relieved from their trust, and the moneys have been invested in Court for the benefit of the infant children. But the trustees to whom, as regards legal interest, those policy moneys belonged, were not made parties. The order to which I have referred, which directed the policy moneys to be brought into Court, took notice, by way of recital, that the policies had been settled, and yet, notwithstanding, proceeded to direct that the policy moneys should be brought into Court to the general credit of the cause. The result of which would have been, that if debts of the late Lord *Massareene* had to be paid, these moneys standing to the general credit of the Cause Petition would have been available to pay those debts.

My Lords, one of the insurance companies, under that Order, paid the money into the Court of Chancery in *Ireland*. The other insurance company, the *Provident*, naturally taking notice that the policy had been assigned, and that the assignees were not parties to the suit, refused to obey the Order, and it became necessary for those who were conducting the Cause Petition in *Ireland* to take proceedings for the purpose of obtaining payment of the money from that insurance company. Even then, one would have supposed that those who were conducting these proceedings would

have seen the error they had committed, and that they would have rectified the error by making the trustees parties. But they contented themselves with informing the trustees of what had occurred, and asked them to give a formal receipt to the insurance office for the moneys secured by the policy. The trustees naturally answered that they were bound to see to the application of the moneys, that the payment of the moneys generally into Court to the credit of the cause might lead to the misapplication of the trust fund, and that therefore they could not give a receipt for the payment of the money to the credit of a cause to which they were not parties. The course that was then taken was this :—Considerable correspondence ensued, in the course of which the solicitor for the Cause Petition asked the trustees if they would relinquish the trust, which the trustees declined to do. Thereupon a Petition under the *Trustee Act* was presented to the Court of Chancery in *Ireland* in the name of the minor children of the late Lord *Massareene*, not stating the correspondence in terms, but stating the general effect of it as it appeared to those who prepared the Petition, and stating, as the result, that the trustees had declined to act, and praying the Court to appoint new trustees in the room of the late Lord *Muskerry* and Mr. *Beavan*, who (the Petition alleged) declined to act. My Lords, I know not how it occurred, but the Lord Chancellor of *Ireland* was induced to take this view of the case, that these trustees had declined to act. And, accordingly, an Order was made, dealing with the settlement of 1854 and the trusts of it, and appointing two new trustees in the room of the late Lord *Muskerry* and Mr. *Beavan*, who, as the Order alleged, had declined to act on the trusts. The first notice of this Order that was given to Lord *Muskerry* and Mr. *Beavan* was in the form of a communication from the *Provident Insurance Company*, stating to them that they had been informed that new trustees had been appointed of the policy in their office, and that they were asked to pay the money to the new trustees. The directors of the insurance company appear to have thought, as they well might think, that there was something irregular ; and in place of paying the money to the Court of Chancery in *Ireland*, they paid it under the *Trustees Relief Act* into the Court of Chancery in *England*. I need not trace what took place in *England*, farther than by saying that the

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matter came before the Master of the Rolls, who thought that Lord *Muskerry* and Mr. *Beavan* should be treated as having an interest in this money, and he very properly required that the money should be transmitted to *Ireland* to the suit there; but that before that was done an order should be obtained in *Ireland* that the money secured by the *Provident* policy should be carried to the separate account of the settlement and those interested under it, and should not be dealt with in *Ireland* without notice to Lord *Muskerry* and Mr. *Beavan*. Lord *Muskerry* and Mr. *Beavan* then applied immediately, or about the same time, to the Court of Chancery in *Ireland*. They stated that they had not declined to act in the trust, and that the Order proceeding upon that assumption had been made behind their backs, and they prayed in substance that the erroneous Order, appointing new trustees in their stead, might be discharged, and that whatever interest had been taken out of them by that Order might be restored from those persons who had been appointed trustees in their stead. That application was refused by the Lord Chancellor of *Ireland*, and refused with costs, and from that Order, as well as from the other, the present appeal is brought.

My Lords, after this statement I need hardly trouble your Lordships with any expression of opinion at length. These proceedings were manifestly illegal, in the highest degree, from the beginning to the end: there was no justification of any kind for the course which was adopted. In the first place no Order should have been made affecting the position of the trustees without notice to the trustees, and making them parties to the Petition. In the next place, no attempt should have been made in the Cause Petition to deal with the case, except by ear-marking the moneys as settlement-moneys, and at the same time making the trustees, who were bound to see to the execution of the trusts, parties to the Petition. In the next place, it was a statement as remote from the fact as could well be conceived, to inform the Court of Chancery that Lord *Muskerry* and Mr. *Beavan* had declined to act in the trusts, when (as one of your Lordships has already observed) in point of fact they had declined to decline to act in the trusts. And finally, it was, as it appears to me, a miscarriage of the Court of Chancery in *Ireland*, when the matter was brought to its attention

by the new Petition of Lord *Muskerry* and Mr. *Beavan*, to omit to rectify the mistake which had occurred, and to discharge the former Order which had been made. Under these circumstances, I apprehend that your Lordships will have no doubt that it will be necessary to undo what has been done by the Court of Chancery in *Ireland*.

There remains, my Lords, the question of costs. I think that Lord *Muskerry* and Mr. *Beavan* had no choice but to intervene, and to take care that the irregularity which had been committed was set right. I think that, as trustees, they are entitled to be indemnified for the costs they have thus incurred. If those to whom the irregularity is chargeable in *Ireland* had been the persons whose names occur as the Petitioners in the Cause Petition, namely, the minor children of the late Lord *Massereene*, if they had been personally chargeable with the irregularity, and had been persons of age to answer for it, your Lordships might have been disposed to order the costs which have been incurred to be paid by them. But, of course, the irregularity is not chargeable to them; and I regret that I cannot offer to your Lordships any other advice than that the costs should be made good out of the funds of those minor children, who, I am of course aware, are not chargeable with what has taken place, but whose interests must suffer because those who are chargeable are not within the reach of your Lordships' jurisdiction.

Therefore, my Lords, I move that the Orders of the 5th of December, 1863, and 28th of May, 1864, be discharged, and that your Lordships declare that the £1846 3*s.* 1*d.* lodged by the *Royal Exchange Assurance Company* to the credit of the Cause Petition should be carried over to a separate account, "The Account of the Policy Moneys of the Settlement of 14th October, 1854," and not be dealt with without notice to the surviving Appellant. That the surviving Appellant is entitled to appear in all farther proceedings relative to the fund included in the said settlement as a party to the said Cause Petition; and that the surviving Appellant is entitled to be paid out of the funds, subject to the trusts of the said settlement, his costs, as trustee, of the said application of the Appellants to the Court of Chancery of *Ireland*, and of this appeal.

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LORD CRANWORTH:—

My Lords, I have only to express my entire concurrence in what has been stated by my noble and learned friend. It is a matter of the deepest regret that, through some oversight which we are unable to explain, these Orders have been made thus irregularly behind the backs of the parties affected by them, and that the costs are necessarily thrown on the fund *in medio*.

LORD WESTBURY:—

My Lords, I have never in my experience met with a more painful exhibition of impropriety and irregularity than in these proceedings. That pain is increased by the regret that we cannot throw the costs upon the persons who most improperly presented the Petition to the Court of Chancery in *Ireland*, containing that grossly inaccurate allegation that the trustees had declined to act, and who, in the name of the infants, opposed the very proper application of the trustees to set right that which had been wrongly done. My Lords, the necessity of indemnifying the Appellants renders it imperative upon us to give them their costs out of the trust estate. Whether the infants have any remedy against those who have brought that burden upon the estate it will be for another tribunal to determine. It is a question which it is impossible for us to entertain. That remedy may possibly be found, and it may be found to extend also to protect their estate from being burdened with the Respondents' costs of this appeal.

Orders appealed from discharged; cause remitted, with declaration.

Lords' Journals, 28th May, 1868.

Solicitors for Appellant: *C. J. & H. Shoubridge.*
Solicitors for Respondents: *Palmer, Palmer, & Bull.*

THOMAS LUCAS . . . . . APPELLANT; 1868 May 28.

AND

WILLIAM JACKSON RIDEOUT . . . . . RESPONDENT.

Agreement—"Leave the House."

L. was the holder of a lease of premises from *S.* for twenty-one years, determinable at the will of either party at the end of the first seven or fourteen years. The first seven years would expire at Christmas, 1863. *L.* had expended considerable sums on the premises, for which he was to receive £1800 from *R.*, to whom he agreed to assign the lease. The agreement contained these stipulations:—"If *R.* is ejected by *S.*, the £1800 to be repaid to *R.* If *S.* exercises the power of determining the lease at Christmas, 1863, and *R.* leaves the house, £1100 are to be returned to *R.* If at Christmas, 1863, the tenancy of *R.* is continued, the £1800 to be retained by *L.*" *R.* entered into possession, and his aunt, Mrs. *C.*, resided with him. In May, 1863, *S.* gave notice of an intention to determine the tenancy. At Christmas, 1863, Mrs. *C.* became lessee to *S.*, under a new lease, at a largely increased rent. *R.* continued to live in the house after his aunt, Mrs. *C.*, had become the lessee. *R.* claimed the return of the £1100 under the agreement. There were equitable defences to the effect that the new arrangement was collusive as between *R.*, *S.*, and Mrs. *C.*, but there was no proof that *R.* was the person really liable under the new lease:—

Held, affirming the judgment of the Court of Exchequer Chamber (which had reversed a previous judgment of the Court of Exchequer), that the agreement must be construed as applying entirely to a legal termination of *R.'s* tenancy, which having taken place, he was entitled under the agreement to the return of the £1100.

THIS was an appeal, under the *Common Law Procedure Act*, 1854, against a judgment of the Court of Exchequer Chamber, which had reversed a previous judgment of the Court of Exchequer.

On the 5th of January, 1857, Mr. *Lyne Stephens* demised to Mr. *Lucas* a messuage and certain other premises, situated at *Roehampton*, at a rent of £400 a year, for a term of twenty-one years from Christmas, 1856, but determinable by either party at the expiration of the first seven or fourteen years. Mr. *Stephens* died, and the property passed to Mrs. *Lyne Stephens*, his widow.

On the 10th of October, 1861, Mr. *Lucas* agreed to let Mr. *Rideout* have possession of these premises on the following conditions:—"To pay for the furniture, as per valuation, £865 5*s.* 6*d.*,

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and for Mr. *Lucas's* improvements £1800. If Mr. *Rideout* is ejected by Mrs. *Lyne Stephens* in the first instance, the furniture to be sold, and the loss between the £865 5*s.* 6*d.* and the sum realized by such sale to be borne equally between Mr. *Rideout* and Mr. *Lucas*, and the proceeds of the sale and the £1800 to be repaid to Mr. *Rideout*. If Mrs. *Lyne Stephens* exercises the power of determining the lease at Christmas, 1863, and Mr. *Rideout* leaves the house, £1100 to be returned to Mr. *Rideout*. If at Christmas, 1863, the tenancy of Mr. *Rideout* is continued, the £1800 to be retained by Mr. *Lucas*. Mr. *Lucas* engages not to exercise his power of determining the existing lease. Mr. *Rideout* to be entitled to call upon Mr. *Lucas* for an assignment of the existing lease." No assignment was ever called for.

After the agreement Mr. *Rideout* and his aunt, Mrs. *Crompton*, entered into possession of the premises. In May, 1863, Mrs. *Lyne Stephens* gave notice of determining the lease at the end of the first seven years, at Christmas, 1863. On the 15th of December, 1863, Mrs. *Crompton* entered into an agreement with Mrs. *Lyne Stephens* for a lease of the premises for seven years from Christmas, 1863, at a rent of £600 a year. Mrs. *Crompton* continued in the house, and Mr. *Rideout* did not, in fact, leave it, but lived there as he had done before.

Mr. *Rideout* brought his action to recover the £1100 under the agreement. The declaration fully set it forth, and alleged that Mrs. *Lyne Stephens* did exercise the power of determining the lease, and that the Plaintiff did "leave the house according to the true intent and meaning of the agreement."

The Defendant *Lucas* pleaded, 1st, that he did not agree as alleged; 2ndly, that Mrs. *Lyne Stephens* did not exercise the power, as alleged; 3rdly, that the Plaintiff did not leave the house according to the true intent and meaning of the agreement; and, 4thly, by way of equitable defence, that the Plaintiff entered into the agreement for the use and benefit of Mrs. *Crompton*, and in order that she might occupy the said mansion and premises, and she did occupy the same, and that the Plaintiff only occupied them by means of her occupation; that the power was exercised by Mrs. *Lyne Stephens* in pursuance of a collusive agreement between her and the Plaintiff and Mrs. *Crompton* that she should exercise the

power, and grant to Mrs. *Crompton* a fresh lease, that the occupation of Mrs. *Crompton* should not be disturbed, but should continue notwithstanding the exercise of the power, and that the Plaintiff should thus obtain substantially the same advantage, and be placed substantially in the same position with reference to the object for which he entered into the said agreement with the Defendant, as if the Plaintiff did not leave the said house, while he should, in point of form, leave the same, and so at law entitle himself to claim the said money from the Defendant. And that, in pursuance of the said agreement, the said new lease was granted to Mrs. *Crompton* by Mrs. *Lyne Stephens*, and her occupation was not disturbed, but continued as aforesaid. And the Plaintiff thereby substantially obtained the same advantage, and was placed in the same situation with reference to the purpose for which he entered into the agreement with the Defendant, as if he also had not left the house. In a fifth plea, also by way of equitable defence, the agreement between the Plaintiff and Defendant was set out at full length, and the Defendant alleged, in substance, that all that had been done by the Plaintiff in the matter was done by him as the agent for Mrs. *Crompton*, and that the Plaintiff never was the tenant of the premises otherwise than by the occupation of Mrs. *Crompton*.

The Plaintiff's replication took and joined issue on all these pleas.

At the trial of the cause before Mr. Baron *Martin*, at Guildhall, on the 8th of December, 1864, his Lordship thought the Defendant entitled to a verdict on the issue joined on the third plea. A nonsuit was entered, with leave to the Plaintiff to move. A rule was accordingly obtained, but (*diss.* Mr. Baron *Channell*) was discharged. The case was carried by appeal to the Exchequer Chamber, where the judgment was reversed. This appeal was then brought.

Mr. *Mellish*, Q.C., and Mr. *Bushby*, for the Appellant:—

From the first, the Plaintiff was but a nominal party to the agreement, which was, in fact, the agreement of Mrs. *Crompton*. He lived in her house before Christmas, 1863, as he lived in it afterwards; his condition really was not changed. He certainly

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never was ejected through the act of Mrs. *Stephens*. The assignment was never executed, so that the Respondent was not at any time, in point of law, the tenant of the house, but, at the utmost, was only the tenant from year to year of the Appellant. He could not, therefore, be said to have left the house within the meaning of the words in the agreement. [LORD WESTBURY:—Are not the words "leave the house" construed by the words of the next paragraph, "of the tenancy of *R.*," &c. The word "tenancy" must have its ordinary meaning.] The words mean cease to reside. The Respondent did not cease to reside; he resided there still. The leaving which was to be provided against was a leaving occasioned through the hostile exercise of the power possessed by Mrs. *Lyne Stephens*, otherwise it might be made to mean that if *Rideout* agreed with her to purchase the freehold, and so of his own accord put an end to the tenancy, he should have the same compensation as if she had, against his will, turned him out of possession. No one could pretend that that was the real meaning of the agreement. There had not been in this any exercise of the power by the lessor, against which it was the intention of the agreement to provide.

Mr. *T. Jones*, Q.C., for the Respondent, was not called on.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the agreement, the construction of which is the subject of this appeal, is certainly not expressed with much perspicuity, but I think your Lordships will have no difficulty in arriving at a conclusion as to what is the substantial meaning of the words used. It appears that Mr. *Rideout* wished to become the possessor of the lease which Mr. *Lucas* had of this property from Mrs. *Lyne Stephens*, and, inasmuch as there were certain improvements which had been made in the property, the object was, that while those improvements were paid for, there should be some arrangement by which, if the tenancy or interest of Mr. *Rideout* in that property should be terminated before the lapse of a sufficient number of years, there should be a return of the whole, or part, of the money which he had paid. In order to provide for that, the agreement, as it now stands, is thus expressed:—"If Mrs. *Lyne Stephens*

exercises the power of determining the lease at Christmas, 1863" (which was the end of one of the periods of seven years) "and Mr. *Rideout* leaves the house, £1100 to be returned to Mr. *Rideout*. If at Christmas, 1863, the tenancy of Mr. *Rideout* is continued, the £1800 to be retained by Mr. *Lucas*."

I think that both alternatives of the agreement must be looked at, and, looking at both, it certainly appears to me that what the first alternative intended to express was, not the mere mechanical leaving or not leaving of the house by Mr. *Rideout*, but the much more important idea of his ceasing to be tenant, or to have a legal interest in the house; and the stipulation amounts to this:—If Mrs. *Lyne Stephens* exercises the power of determining the lease at Christmas, 1863, and Mr. *Rideout* thereupon ceases to be tenant, or to have a legal interest in the house, £1100 are to be returned to Mr. *Rideout*. If, on the other hand, at Christmas, 1863, the tenancy of Mr. *Rideout* continues, the £1800 are to be retained by Mr. *Lucas*.

Now, what happened was this:—the tenancy was determined at Christmas, 1863, a new lease was made out at an increase of £200 a year rent to Mrs. *Crompton*, who was aunt of Mr. *Rideout;* and after Christmas, 1863, Mrs. *Crompton* and Mr. *Rideout* continued to reside in the house. If the Appellant could have gone farther, and produced any evidence to shew, as averred in one of his pleas, that this occupation subsequent to Christmas, 1863, was an occupation with respect to which Mr. *Rideout*, although the name of Mrs. *Crompton* was used, was really, and in equity, the tenant of the property, and the person liable under the new lease for the rent, and entitled to the benefit of the new lease; then, indeed, I apprehend that he might have said, within the meaning of the agreement, that Mr. *Rideout* had not left the house. But no evidence has been adduced of that fact, as averred; and certainly it appears to be impossible, from the letters which have been referred to as part of the case, that your Lordships can arrive at the inference that that was the state of the relations between Mr. *Rideout* and Mrs. *Crompton*. I therefore advise your Lordships that you cannot do otherwise than affirm the decision of the Court of Exchequer Chamber, and I move your Lordships that this appeal be dismissed.

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LUCAS v. RIDEOUT

LORD CRANWORTH concurred.

LORD WESTBURY:—

My Lords, with reference to the observations that were made in the Court below, it is material to remark that there is nothing in the special case stated for the opinion of the Court which would warrant the legal conclusion, either that Mrs. *Crompton* had an equitable interest in the lease believed to be assigned by Mr. *Lucas*, or that Mr. *Rideout* had an equitable interest in the lease subsequently granted to Mrs. *Crompton*. There is nothing to warrant either of those conclusions. We are therefore left to determine the case simply upon the language of the agreement. Now, I think there is very little difficulty with respect to the language of the agreement; and that, in fact, great stress has been laid upon words which, although they undoubtedly occur in the agreement, and have a sense attributable to them, were not intended to have any particular signification. The lease was originally for twenty-one years, determinable at the end of every seven years. The agreement was made in October, 1861; and the lessor had a right to put an end to the lease at Christmas, 1863. Now, the alternatives intended to be provided for were, her exercising that right and her not exercising it. If she did not exercise it, the lease would continue, and the tenancy of Mr. *Rideout* would continue. If she did exercise it, the tenancy of Mr. *Rideout* would be at an end. The agreement provides for these two things; and as Mr. *Rideout* paid a large sum of money for Mr. *Lucas's* improvements, the agreement says, if the lessor exercises the power of determining the lease at Christmas, 1863, and Mr. *Rideout* leaves the house in consequence of her so doing, his tenancy being thereby determined, £1,100 are to be returned to Mr. *Rideout*. The correlative event is thus expressed:—if at Christmas, 1863, the tenancy of Mr. *Rideout* is continued (that is, is not determined, but is suffered to go on under the lease agreed to be assigned), then the £1800 are to be retained by Mr. *Lucas*. The real event intended to be referred to by the preceding clause is, therefore, simply the fact of the lessor putting an end to the lease at Christmas, 1863,—and the whole argument has been rested upon those words, which really express only the legal determination of the tenancy of

Mr. *Rideout.* If the words admit of a different signification (and if you quit the legal signification they may admit of many), if the words admit of any ambiguity, that ambiguity is removed entirely by taking the subsequent passage referring to the event of the lessor not exercising the power of determining the lease, and then introducing these words, "the tenancy of Mr. *Rideout* being continued." I think, therefore, that by proceeding according to the just and proper mode of construing ambiguous words which are to be found in one sentence by reference to another sentence which speaks of an event not happening which the antecedent sentence provides for, no one can entertain any serious doubt that these words should be thus construed:—If Mrs. *Lyne Stephens* exercises the power of determining the lease at Christmas, 1863, whereby Mr. *Rideout's* tenancy will be determined, the £1100 are to be returned; but if at that period of time she does not exercise that power, then the £1800 are to be retained. I therefore entirely concur in the opinion which has been expressed by my noble and learned friend.

LORD COLONSAY also concurred.

Judgment of Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Lords' Journals, 28th May, 1868.

Attorneys for the Appellant: *Maynard, Son, & Co.*
Attorney for the Respondent: *Crosby.*

1868
June 22.

ORANGE STERLING KELLETT, Clerk . . Appellant;

AND

ARABELLA KELLETT . . . . . Respondent.

Will—Revocation—Practice.

If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails.

Lassence v. *Tierney* (1) confirmed.

A testator, by his will, directed his trustees holding his real estate to levy and raise for his five daughters, naming them, the sum of £1000 each:—

Held, that this was in itself an absolute provision for each.

The will directed that the sum of £1000 each should be raised "subject to the provisoes thereinafter expressed:" *i.e.*, the trustees were to permit each daughter to take the interest for life—in case she should marry, her husband was to take the interest for life—and after the decease of any daughter unmarried or without issue, the principal was to be applied amongst all or any of his other children, &c., in such shares as the daughter dying should appoint, and, in default of appointment, amongst the surviving children or their issue in equal shares. By a codicil he revoked his will "so far as the said sum to each of my said daughters is given absolutely, and I declare that in the event of any of my said daughters remaining unmarried, she shall only be entitled to an interest for her natural life," and he then confirmed the gift, "subject to the restriction aforesaid."

Held, that these provisions did not qualify the gift, except so far as the restriction as to remaining unmarried was concerned.

Held, also, that, notwithstanding the revocation, by the codicil, of the absolute gift, the Court below had properly declared the survivor entitled for her life to a distributive share of her deceased sisters' interests in the sums given to them.

The testator resided in a house at *W.* By his will he recited that he had made a lease of this house and certain lands adjoining, and he directed his trustees to hold the house and lands for the lives of his five daughters and their survivors, subject to the yearly rent of £2 10*s.* per annum, his object being to provide them with a residence. By a codicil he declared that his (then surviving) daughters should have "the house at *W.* and the lands as laid out, furniture, and plate at their disposal:"—

Held, that reading the will and codicil together, the surviving daughter

(1) 1 Mac. & G. 551; 2 H. & T. 115.

was entitled to have the house and land free from any rent, and to have the plate and furniture absolutely.

The Respondent desired to contend that, in one respect, the decree of the Court below was too favourable to the Appellant, but as there was no cross appeal, the House would not hear that point argued.

THIS was an appeal against two Orders of the Court of Chancery in *Ireland*.

Robert Kellett was seised, under different titles, of lands in the two counties of *Cavan* and *Meath*, and by a will, dated the 26th of June, 1841, he devised the same unto *Thomas Barnes*, jun., and to his own two sons, *Edward Kellett* and *Orange Sterling Kellett*, in trust for various purposes, one of which was, "out of the rents, &c., of the said lands, or by demise, mortgage, or sale thereof, to levy and raise" for his daughters *Frances*, *Henrietta*, *Arabella*, *Matilda*, and *Susan*, the sum of £1000 each, "subject to the provisoes, conditions, and limitations thereinafter expressed of the same; that is to say, that the trustees should pay to, or permit and suffer each of his five daughters to receive and take, for the term of her life, the interest from the day of his decease;" and in case any of his daughters should marry, to suffer the husband to take the interest of the £1000 for the term of his life; and from and after the decease of any one and each of his said daughters who should marry, on trust to pay her children the sum of £1000 in equal shares at twenty-one or marriage; and upon the death of each of his said daughters unmarried, or, being married, her death without issue, to apply the principal sum of £1000 amongst all or any of his other children, &c., in such shares as any daughter so dying should appoint; and, in default of appointment, amongst his surviving children and the issue of such of them as should then be dead, in equal shares and proportions, &c.: and, subject to these and some other special trusts, he devised the lands unto his sons *Edward* and *Orange Sterling Kellett* equally, and the heirs of their respective bodies in tail, with cross-remainders between them in tail; and, after reciting that by an indenture of that date he had demised to *Thomas Barnes*, jun., his house at *Waterstown* as then furnished, and thirty acres of land, to hold for the lives of the said five daughters, subject to the yearly rent of £2 10*s.* an acre, he declared that the lease was made in trust for and for the use of

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the said five daughters and the survivor of them, and in order, after his decease, to provide them with a residence; and he devised the residue of his estate and effects, subject, &c., to his said sons *Edward* and *Orange Sterling*, their heirs, &c., in equal shares, and he appointed them his executors.

Frances Kellett died soon after the making of the will.

The testator made a codicil on the 31st of December, 1842, by which he recited the gift of £1000 to his daughter *Susan;* that she had since married *Robert Mayne;* and that on the occasion of that marriage he, the testator, had paid £1250 as a marriage portion to *Susan;* and that, by his will, he had devised and bequeathed unto his daughters *Henrietta, Matilda,* and *Arabella,* the sum of £1000 each, and he thereby revoked his will so far as related to the bequest of the £1000 to the said *Susan Mayne,* and so far as she was an object thereof, and he declared that she should not take the £1000 by the will given to her, or any other devise, bequest, contingent interest, benefit, or advantage whatsoever which she might have been entitled to under the will in case he had not executed this codicil; and he thereby farther revoked his will so far as the said sum of £1000 to each of his daughters, *Henrietta, Matilda,* and *Arabella,* was given absolutely, and he declared that in the event of his daughters *Henrietta, Matilda,* and *Arabella,* or any of them, remaining single or unmarried, they or she should only have or be entitled to an interest for their or her natural lives or life, and no longer, in the said sums of £1000 each, which devise and bequest of £1000 to each of them he did thereby confirm, subject to the conditions aforesaid.

By another codicil, dated the 21st of May, 1844, the testator, reciting that his son *Orange Sterling* had married, and that a settlement had been made on him, revoked the will so far as the said *Orange Sterling Kellett* was beneficially concerned, and made *Edward* his sole executor and residuary legatee.

On the 21st of April, 1847, the testator made a third codicil, and thereby declared that his daughters *Henrietta, Matilda,* and *Arabella,* should get fortunes equal to what was settled upon his daughter *Susan* by her marriage settlement (*i.e.,* £1250), and that they should have the house of *Waterstown,* thirty acres of land as laid out, furniture and plate at their disposal, and that the codicil

with respect to *Orange Sterling* should be cancelled, and that in lieu of his marriage settlement he should be considered, as he, the testator, had settled by his will, equally with his son *Edward*, &c.

The testator died on the 27th of April, 1847, leaving *Edward* and *Orange Sterling*, and four daughters, *Susan* (*Mayne*), *Henrietta*, *Matilda*, and *Arabella*, him surviving.

In December, 1858, *Edward* assigned all his contingent interest under the will and codicils to his brother *Orange Sterling*.

Matilda died in 1863 unmarried, having, by a will previously executed, appointed all her interests to her sisters *Henrietta* and *Arabella*. *Henrietta* died in 1864 unmarried, having previously made an appointment of all her interests to her sister *Arabella*.

In January, 1865, *Arabella* presented a Cause Petition to the Court of Chancery in *Ireland*, to which *Barnes* and *Orange Sterling Kellett* were made Defendants, which set forth all the above facts, and prayed that the trusts of the will and codicils might be carried into execution; that the Petitioner's rights, in her own behalf, and as appointee of *Matilda* and *Henrietta*, might be ascertained, and also that her rights to the house and the thirty acres of land in *Waterstown* might be declared.

Orange Sterling Kellett (the Defendant in the Cause Petition, and the now Appellant) filed an answering affidavit, and submitted that, on the true construction of the will and codicils, and in the events which had happened, *Matilda* and *Henrietta*, who had died unmarried, had no greater interest in their fortunes than for their lives respectively; that the first codicil revoked the bequest to each of them, remaining single, of the principal of her portion, and of all disposing power over it; that no lease had, in fact, been executed of the house and lands at *Waterstown*; that his father's intention was that they should be enjoyed as a residence for the unmarried daughters during their lives at a rent of £2 10*s*. per acre; that the plate and furniture were to be enjoyed in the same way for their lives only; and that upon the death of the survivor of the sisters the whole reverted to him. *Barnes*, the other Defendant, did not file any answering affidavit.

The case was argued before the Master of the Rolls in *Ireland*, who, on the 26th of May, 1865, made an order declaring that the Petitioner (*Arabella Kellett*) was entitled to £5 per cent. per annum

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on the £1,250 given to her for her life, subject to the provisions in the will and codicils as to her marrying; that the powers to appoint given by the will to the three daughters were revoked by the first codicil, but that the bequests in the will in default of appointment were not revoked by that codicil; that on the deaths of *Matilda* and *Henrietta* the Petitioner *Arabella* became entitled to a distributive share of the £1,250 given to each under the clause in default of appointment; that *Orange Sterling Kellett* was likewise entitled to a distributive share of each of the said sums in default of appointment; that these sums were well charged on the estates; that the said *Arabella*, having survived her sister *Frances* (who died in the lifetime of the testator), and her sisters *Matilda* and *Henrietta*, and having regard to the provision in the first codicil as to her sister *Susan*, is entitled under the third codicil to the interest of the testator in the house at *Waterstown* and the thirty acres of land as laid out, but free from the rent of £2 10*s.* per acre as in the will mentioned; and that *Arabella* was entitled absolutely to the furniture and plate.

On appeal by *Orange Sterling Kellett* this decree was affirmed (1), and the present appeal was then brought.

The *Attorney-General for Ireland*, and Mr. *Jessel*, Q.C., (with whom was Mr. *C. A. Holmes*, of the Irish Bar,) for the Appellant:—

The real question here is as to the effect of the revocation clause in the codicil. Assuming that the gift in the will was an absolute gift of the sum of £1000 to each daughter, the first codicil reduced that to the gift of a life interest in that sum, and the power of appointment, which existed only in respect of the absolute gift, was gone when that gift was itself revoked. Then the gift over in default of appointment being merely accessory to the power of appointment, when that power was gone the gift over in default of appointment fell with it, and on the death of each unmarried daughter her portion sank into the residue.

As to the house at *Waterstown* and the land there, they were intended only as a residence for the unmarried daughters during their lives at a rent of £2 10*s.* per acre of the land, and the plate and furniture were only to be used by them as accessories to the

(1) 16 Ir. Ch. Rep. 63.

residence, and on the determination of the life estate would become the property of the Appellant.

Sir *Roundell Palmer*, Q.C., and Mr. *Lawson*, Q.C., of the Irish Bar (Mr. *J. C. Lowry*, also of the Irish Bar, was with them), for the Respondent:—

There was a clear gift by the will of an absolute interest in the £1000 (afterwards increased by the codicil to £1250), and, being so, it is a plain rule of law that such a gift cannot be cut down by a codicil except by words as clear as those of the original gift: *Doe* v. *Hicks* (1); *Bunbury* v. *Bunbury* (2). The words of the codicils have no such effect. The mistake in the recital as to the lease of the house cannot affect the application of that rule: *Re Smith* (3).

The decree here was, as to the supposed revocation of the powers of appointment, too favourable to the Appellant, and ought to be corrected.

THE LORD CHANCELLOR:—If so, that ought to have been made the subject of a cross appeal, and there being no cross appeal the House cannot enter into that discussion.

The *Attorney-General for Ireland* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, two questions have been raised before your Lordships by this appeal with regard to the construction of the will and codicil of the testator in this case. On one of these two questions your Lordships did not desire to hear the Counsel for the Respondent. The nature of that question was this:—[His Lordship here read the directions in the will and codicil as to the house and land at *Waterstown*, and the plate and furniture, and said:—]

My Lords, I think there can be no doubt, and I believe your Lordships entertain no doubt, that whatever would have been the effect of the disposition contained in the will had it stood alone, we have in this codicil a clear distinct devise and bequest, to the

(1) 1 Cl. & F. 20-24. (2) 13 Jur. (N. S.) 1091.
(3) 2 J. & H. 594.

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daughters, of the house at *Waterstown*, whatever might be the interest of the testator in that house, and of the thirty acres of land as then laid out, unburdened by any rent whatever, and an absolute bequest of the furniture and plate in that house. In that respect I think your Lordships will have no doubt that the decree of the Court below was perfectly correct.

Then, the second question that was raised in the argument was of a somewhat more difficult character. It was whether the provisions of a pecuniary legacy made by the testator for his daughters in his will were revoked or modified, and, if so, to what extent, by the codicil subsequently made. Now, turning to the will, what the testator had done was this:—he had directed his trustees, to whom he had devised his real estate, to levy and raise to and for his daughter *Frances* the sum of £1000; to and for his daughter *Susan* the sum of £1000; for his daughter *Henrietta* the sum of £1000; to and for his daughter *Arabella* the sum of £1000, and to and for his daughter *Matilda* the sum of £1000. It was stated, and it is not in dispute between the parties, that the amount of these legacies was afterwards increased from £1000 to £1250; and that, so far as his daughter *Susan* was concerned, her interest was entirely revoked.

Having provided that these sums should be set apart for his daughters, the testator engrafted upon that provision subsequent limitations which I need not read in detail; but I may state, in general terms, that limitations were added, in case the daughters should marry, giving them and their husbands life interests, and giving the capital to their children at the age of twenty-one or marriage—if there should be children—and in the event of there not being children, or the daughters not marrying, providing that these legacies might be appointed by the daughters among the other children of the testator, or their issue; and that in default of such appointment those pecuniary legacies should go over to, and be divided among, the other children then surviving, and the issue, if any, of such as should then be dead. Therefore, in the will, your Lordships have a clear and distinct provision of these sums for each daughter, and a clear and distinct limitation of the sums in favour of the husbands, and children of the daughters, if there should be any; and if there should not be any, a clear power of

appointment in the terms to which I have referred, and a clear gift over in default of that appointment.

My Lords, the principle to be applied to the construction of these dispositions, apparently inconsistent, the one occurring in the will, and the other in the codicil, are not in dispute between the parties to this litigation; and at this time they could not be in dispute. The principle is perfectly clear, that where you have a distinct disposition made by a will, that disposition cannot be revoked by a codicil except through the medium and use of words equally clear and distinct. Now, my Lords, the codicil which is here asserted to have modified the dispositions to which I have referred in the will, is the codicil of the testator numbered one; in which he expressed himself thus:—He first took notice of the marriage of his daughter *Susan*, and declared that she, having had a settlement, should not take the legacy of £1000 given to her by his will, nor any other devise, bequest, contingent interest, or advantage whatsoever which she might be entitled to under the will in case the codicil had not been made. And then the testator proceeds thus:—"I do hereby farther revoke my said will, so far as the said sum of £1000 to each of my said daughters *Henrietta, Arabella,* and *Matilda Kellett,* is given absolutely, as I hereby declare, and my will is, that in the event of my said daughters, *Henrietta, Arabella,* and *Matilda,* or any of them, remaining single or unmarried, they or she so remaining single or unmarried shall only have and be entitled to an interest for their or her natural lives or natural life, and no longer, in the said sum of £1000 each, which devise and bequest of £1000 to each of them the said *Henrietta, Arabella,* and *Matilda,* I do hereby confirm, subject to the condition or restriction aforesaid."

Now I apprehend that if that codicil had been placed before any of your Lordships for consideration, without reference to the provisions in the will, your Lordships could have had no doubt as to what the testator must be taken to have meant by the expressions which he used. He revokes his will, so far as the pecuniary legacy to each of his daughters is given absolutely; by which I understand that he revokes his will so far as that legacy is given absolutely to each of his daughters. The inversion of the words cannot make any practical difference in the meaning of the

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sentence. And then, in the subsequent part of the codicil, by noticing the contrast between the words there used and the disposition in the will to which he refers, your Lordships can see clearly what the object was which the testator had in view. If they remain unmarried, they are to have the legacy for their lives, and no longer, pointing evidently, by way of contrast, to the impression upon the mind of the testator, that if he had not made this codicil they might, in some way or other, have had a greater interest in the pecuniary legacy than for their lives. And then he continues:—"Which devise and bequest of £1000 to each of them, the said *Henrietta*, *Arabella*, and *Matilda*, I do hereby confirm, subject to the condition or restriction aforesaid." But "the condition or restriction aforesaid" was nothing more than this—a condition or restriction that if unmarried they should not have the legacy for more than their lives. In every other respect the disposition in the will, whatever it be, is confirmed, and is made subject to that one restriction to which I have referred.

It appears to me that, after this, the only legitimate subject of inquiry remaining is this:—Was there, in any sense, a gift by the will to the daughters absolutely, or one in which, in any event, they could have taken an absolute interest? Because if there is in the will such a gift—a gift answering those words or that description—then you satisfy every word which the testator has used; and you have no right, as it appears to me, to speculate as to what meaning might have been in the mind of the testator in the words which he has used, if those words are apposite to describe the character of the bequest made by the will.

Now, when we turn back to the will, although I have read a portion of it before, I would remind your Lordships of the peculiar manner in which these pecuniary legacies are first mentioned by the testator. The direction of his will is "to the trustees holding his real estate to levy and raise to and for his daughter *Frances*, to and for his daughter *Henrietta*, to and for his daughter *Arabella*, to and for his daughter *Susan*, and to and for his daughter *Matilda*, the sum of £1000 each."

If the will had stopped there, it is perfectly clear that this is an absolute provision and gift to each of his daughters. There is no kind of qualification, and no limitation, making it anything

short of a complete legacy in their favour. He does go on to impose promiscuous conditions and limitations afterwards expressed. But what are those promiscuous conditions and limitations? They are conditions and limitations in favour of the husband of each daughter who should marry, in favour of children, in favour of surviving brothers and sisters in the event of the daughter dying unmarried, and in favour of the issue of his other children surviving the daughter who so dies unmarried. But your Lordships well know the general principle applicable to provisions of that kind for children, which cannot be better expressed than it was by Lord *Cottenham* in the case of *Lassence* v. *Tierney* (1). Referring in that case to a long line of earlier cases of the same kind, Lord *Cottenham* says:—"If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails." Therefore, had there been, by any circumstances, a failure of the specific objects for whose benefit the limitations were engrafted in the absolute gift, in that case the absolute gift to the daughters, or any of them, would have prevailed. The case might very easily be put of all the daughters remaining unmarried and one surviving the others, and there being at the time of her death no one of the objects of the gift over in existence, the result would have been that that unmarried daughter would remain the absolute owner of the provision made by this pecuniary legacy. Other cases, more unlikely, perhaps, but still possible, might be put in which a similar result would have occurred.

My Lords, I think that is quite sufficient to shew that when the testator used the words to which I have referred, revoking his will so far as the sum of £1000 to each of his daughters is given absolutely, he used words every one of which is satisfied by the interpretation I have pointed out. If that is so, your Lordships will be of opinion that you are not entitled to go beyond the plain and proper construction of the words, applying the words of the codicil to that view of the will which I have taken the liberty of pointing out to your Lordships.

(1) 1 Mac. & G. 551; 2 H. & T. 215.

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It is quite true that the *ratio decidendi* which I have suggested to your Lordships, for this case, might lead us to go even beyond the point to which the Court of Chancery in Ireland has gone, and to hold that the Appellant has got rather more than justice from the Court of Chancery in Ireland. But the case which has been opened to your Lordships upon this appeal involves only the question whether the Court of Chancery in Ireland has made a decree too unfavourable to the Appellant, and not the question whether it has made a decree too favourable for him. From what appeared in the course of the argument, I think your Lordships would hardly be inclined to hold that it was desirable that a cross-appeal should now be presented on that point. Your Lordships, therefore, will deal only with the point which has been brought before you by the present appeal; and, if you concur in the motion which I am about to make, you will dismiss this appeal, and dismiss it with costs.

LORD CRANWORTH :—

My Lords, in such a case as this it would be useless for me, following my noble and learned friend, to say more than that I concur entirely in the opinion which he has expressed. There is only one observation which I would make in addition, and it is this:—that unless you treat these words, with reference to the married daughter, *Susan*, as superfluous, it is quite obvious that this construction must be right. By his codicil he revokes the gift which he had made to *Susan* because she had married since the date of his will, and other provision had been made for her, and then he goes on to say: "I hereby declare that she shall not take the said legacy of £1000 given to her, nor any other devise, bequest, contingent interest, benefit, or advantage whatsoever, which she might be entitled to under the said will in case I had not made this codicil." Now, the contingent advantage there referred to is evidently the advantage that she was to take in case of any of the unmarried daughters dying unmarried, in which case the share is given over, and his daughter *Susan*, in that case, would have taken her proportion. The circumstance that he specifically revokes the contingent interest of a daughter who was married, appears to me clearly to shew that he contemplated that, in respect

of those gifts over, they were to remain untouched as given in the will.

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LORD COLONSAY:—

My Lords, I have nothing to add to what has been said by my noble and learned friends, except that I fully concur with them.

Judgment affirmed, and appeal dismissed, with costs.

Lords' Journals, June 22, 1868.

Solicitor for the Appellant: *P. Burrowes Sharkey.*
Solicitors for the Respondent: *Baxter, Rose, Norton, & Co.*

JOSEPH SPACKMAN . . . . . APPELLANT;

AND

LEWIS H. EVANS (OFFICIAL MANAGER) AND THOMAS HUGHES (CREDITORS' REPRESENTATIVE) . . . . . RESPONDENTS.

1868
May 14, 15, 18, 22;
June 23.

Company—Conditions of Retirement—Directors' Powers.

Though the directors of a company may grant to a dissenting shareholder leave to retire from the company on conditions which they deem prudent and advisable to be granted in his case, yet if such conditions are not in accordance with the terms of the deed of settlement, or with conditions for retirement, notice of which was distinctly given to all the shareholders, and which were agreed on at a public meeting of the shareholders, though he performs the conditions on which such leave was granted, and his name is for years removed from the lists of the shareholders, and the company changes its form of conducting its business (of which he has no notice), and dividends are received (in which he does not participate), he is liable to have his name inserted in the list of contributories on the final winding-up of the company (*diss.* Lord *St. Leonards* and Lord *Romilly*).

A joint stock company was formed: a deed of settlement was executed, which had in it various clauses as to the admission and withdrawal of shareholders, and the transfer and forfeiture of shares. On difficulties arising in its business a proposition was made to allow, on certain conditions, dissenting shareholders to retire on the forfeiture of their shares. This proposal, of which distinct notice had been given to all, was adopted at a public meeting of the

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shareholders. *S.*, a shareholder, who owned shares both by allotment and purchase, and who had executed the deed of settlement, dissented from these conditions, and sought by proceedings in Chancery to have the company wound up. He was not successful in the attempt. An action was brought against him for overdue calls. He defended the action. After a time, and while the litigation with him was still going on, the directors entered into an agreement with him to allow him to retire upon conditions which were not those named in the deed of settlement, nor in the proposal agreed to at the public meeting. No notice of these conditions thus entered into with *S.* was shewn to have been communicated to the other shareholders, but the fact of *S.*'s retirement was known to them, and there was no imputation of any fraudulent concealment. The name of *S.* (who had performed all the conditions on which leave to retire was granted to him) was removed from the list of shareholders at the end of 1849. Changes were afterwards made in the mode of carrying on the company's business, and dividends were received; but he was not informed of the changes, he never received a dividend, and he never was called on to take, and never did take, any part in the affairs of the company. In 1861 the company was ordered to be wound up:—

Held (*diss.* Lord *St. Leonards* and Lord *Romilly*), that his name was rightly placed on the list of contributories.

THIS was an appeal against a decision of Lord Chancellor *Westbury*, pronounced on the 11th of February, 1865 (1), which had reversed a previous decision of the Master of the Rolls.

The following is a brief summary of the facts, which are stated fully in detail in the judgments of their Lordships:—

In 1845 a company was formed for the purpose of effecting agricultural assurances. There was a deed of settlement prepared (2).

(1) 34 L. J. (Ch.) 321. 11 Jur. N. S. 207.

5 H. L. 607

(2) The following are the parts of the deed referred to in the argument to shew the relative rights and liabilities of the shareholders and directors:—

"125. That upon the neglect or refusal of any holder of shares for the time being in the company, to pay any instalment or subscription which may be called for or in respect thereof under the provisions hereinbefore contained, within two calendar months after the day to be fixed for the payment thereof as aforesaid, or upon the neglect or refusal of any person after his or her being approved of as a shareholder by the directors for the time being, to execute within the time hereafter prescribed for such purpose either these presents or such deed of covenants as hereinafter is mentioned: Then, and in either of the said cases, it shall be lawful for the board of directors, by notice in writing under their hands delivered or sent by post to such shareholder, &c., to declare that the share or shares in respect whereof there shall be such neglect or refusal, and all money paid to the company thereon, and all the benefit and advantage whatsoever attending the same, shall thenceforth be forfeited to the company, in which case such forfeiture shall take place accord-

The Appellant became an allottee of 300 shares, and afterwards purchased 400 other shares. In 1848, there were difficulties in carrying on the business of the company. A call of £1 per share was made, which he paid; another call of £1 per share was made,

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ingly; *nevertheless it shall be lawful for such directors, if they shall think fit, to enforce the payment of any such instalment, and such interest for the same as aforesaid, from such shareholder, or his or her executors, administrators, or assigns, instead of declaring such share or shares forfeited.*

"126. That it shall and may be lawful for the directors, if they shall think fit so to do, but not otherwise, in case any share or shares shall, under the provisions hereinbefore in that behalf contained, have been forfeited to the company, to discharge such share or shares from forfeiture, and restore the same to the holder thereof on his or her paying to the company such sum by way of fine in respect of such share or shares as the board of directors shall think fit."

"175. That the husband of any female shareholder, or any executor or administrator of any deceased shareholder, may, in the manner and upon the terms in these presents mentioned, become a shareholder in respect of any share or shares held by him or her in the company in either of those capacities, but any such husband, executor, or administrator, who may be desirous of becoming a shareholder in respect of any share or shares held by him or her in that capacity, shall leave notice in writing at the office of the company of his or her desire, and shall describe in such notice his or her name and place of abode, and the number or numbers of the share or shares in respect of which he or she is desirous of becoming a shareholder.

"176. That the holder or holders of any share or shares in the company, whether such holder or holders shall be a shareholder, or the husband of a female shareholder, or the executor or administrator of a deceased shareholder, or the assignee or assignees of a bankrupt or insolvent shareholder, may procure some other person or persons to become a shareholder or shareholders of all or any of the shares held by him, her, or them in the company, or sell the same to the board of directors for the time being of the company subject to the provisions hereinafter made.

"177. That whenever any such holder or holders shall have procured some other person or persons to become a shareholder or shareholders in respect of all or any of the shares held by him, her, or them, in the company, he, she, or they shall give notice thereof in writing at the office of the company, and shall describe in such notice the name and residence of the proposed shareholder, and the number or numbers of the share or shares in respect of which he, she, or they shall have procured such person or persons to become a shareholder or shareholders.

"178. That the holder or holders who shall have procured any person or persons to become a shareholder or shareholders in respect of any share or shares in the company, and who shall be approved of by the directors of the company, shall transfer the same to the proposed shareholder or shareholders at such place and in such form as the said directors shall think proper, and every deed or instrument of transfer of any such share or shares shall be left at the office of the company in order that an

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which he did not pay. An action was brought against him for this second call. He defended the action. A meeting was held in *London*, at which it was proposed that a larger call should be made, and that those who dissented from it should be compelled to pay a

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extract or minute thereof may be entered in the share register book, and to receive thereon an endorsement of such entry, and when the same shall have been left at the said office of the company for the space of seven clear days, exclusive of the day of leaving the same, the party or parties to whom the same share or shares shall have been so transferred shall be entitled to receive the same upon application being made for the same by him, her, or them respectively."

"182. *That it shall be lawful for the directors for the time being, for and on behalf of the company, to sell at such price or prices, and upon such terms as they shall think proper, all or any of the shares as shall from time to time be forfeited under the provisions in these presents contained, to any person or persons who shall be approved of by the directors as fit to become a shareholder or shareholders in respect thereof, and either with or without the dividends which may have been declared to or in respect of such shares in the interval between the forfeiture and purchase thereof and the sale thereof: Provided always, that when any one or more shares shall have been forfeited for non-payment of any call within the time hereinbefore limited for the payment thereof, the directors shall not sell, nor direct to be sold, any more of such shares than shall be sufficient, as near as may be, to pay the amount of the sum payable by the shareholder for the time being in respect of such shares, and legal interest thereupon, and the expenses attending such sale, and all shares which shall remain unsold shall again revert to and become the property of the person or persons to whom the same shall have belonged immediately upon such forfeiture as aforesaid, in the same manner as if such call had been duly and regularly paid.*

"183. *That any general meeting of the shareholders, whether annual or special, may authorize the directors to sell any share or shares which shall or may have been purchased under the provisions of these presents in any manner and time, and subject to such conditions for sale, limitations, restrictions, and other conditions, with power to buy in and afterwards resell the same subject to such and the like or other conditions for sale, limitations, restrictions, and other conditions, and at such price or prices, and upon such terms, as to such meeting, or to the directors, if the power should be delegated to them, shall seem fit, and such authority to sell shall or may extend, in the discretion of such meeting, either to any particular occasion of selling, or to any occasion whatsoever which may happen to occur during any specific time or period to be resolved upon by such meeting.*"

"198. That when and so often as any shareholder shall break, or refuse or neglect to perform or comply with, any of the covenants, agreements, and provisions contained in these presents, and which on his, her, or their part, ought to be performed or complied with, or when and so often as the default or misconduct of any person or persons who, in pursuance of the directions hereinbefore contained, may either solely or with securities have given security to the directors of the company, or any of them, or any trustee or trustees of

portion of this call, and that their shares should be forfeited for non-payment of the rest. To give the opportunity of fully considering this proposition, the matter was adjourned to a meeting to be held at *Chippenham*, on the 13th of November, 1848. That meeting was held, and certain terms afterwards known as the "*Chippenham* arrangement" were then agreed on. The Appellant not assenting thereto, presented to the Court of Chancery a Petition to have the company wound up. This Petition was dismissed by Vice-Chancellor *Knight Bruce*, and the dismissal was, on appeal, confirmed by Lord Chancellor *Cottenham* (1). A fresh action was then brought against the Appellant, which he defended, and put in several special pleas, contesting his liability in every way. After some little time, and while the litigation was still continuing, negotiations were entered upon by the Appellant (in common with six other shareholders) and the directors, and these seven persons were, at the end of 1849, allowed to retire from the company on paying a sum of money less than that which they would have had to pay under the *Chippenham* arrangement. It did not appear that the terms on which they were allowed to retire had been,

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the company, shall, in the opinion of such directors, render any action, suit, or other proceeding necessary upon such security, it shall be lawful for the directors to bring, commence, carry on, and prosecute any action or actions, suit or suits, or other proceedings at law or in equity, and that it shall also be lawful for such directors, when and so often as they shall think fit, to bring, commence, carry on, and prosecute any action or actions, suit or suits, or other proceedings against any person or persons for or on account of any of the property or funds of the company, or for or on account of any contract or engagements with or on behalf of the company, or for or on account or in respect of any other matter, cause, or thing concerning the rights or interests thereof, and at any time afterwards, to stay, compromise, or compound any such action, suit, or other proceeding, and also from time to time to refer to arbitration any disputes or differences in anywise concerning the company upon which there may, in the opinion of the directors, be cause for any such action, suit, or other proceeding, and either before or after the commencement of any action, suit, or other proceeding relative thereto, and that the said directors and trustees respectively, and their respective heirs, executors, and administrators, shall be reimbursed out of the funds or property of the company all loss, costs, charges, damages, and expenses which they shall respectively bear, pay, sustain, or be put unto by reason or in consequence of any such actions, suits, or other proceedings, or any such reference to arbitration as aforesaid."

(1) 1 Mac. & G. 170; 1 H. & T. 229; 18 L. J. (Ch.) 261.

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in fact, communicated to the other shareholders. These seven persons fulfilled the terms imposed upon them, and their names were removed from the register; they never received notice of meetings; changes took place in the conduct of the business of the company, and dividends were paid, of all which they knew nothing. In 1861 the company was ordered to be wound up, and the Appellant's name was then put on the list of contributories. He complained of this, and the case having been heard before the Master of the Rolls, His Honour, acting upon a previous decision of his own in *Brotherhood's Case* (1), which had been affirmed by the Lords Justices (2), ordered his name to be removed from the list. This decision was reversed by Lord Chancellor *Westbury* (3). This appeal was then brought.

Sir *R. Palmer*, Q.C., and Mr. *J. Pearson*, Q.C., appeared for the Appellant.

Mr. *Amphlett*, Q.C., and Mr. *Simpson*, appeared for the Respondent *Evans*.

Mr. *Druce*, Q.C., and Mr. *F. W. Bush*, appeared for the Respondent *Hughes*.

For the Appellant it was contended, that the forfeiture of the shares of the Appellant was valid at Law, and could not be impeached in Equity; that under the circumstances existing here, the shareholders must be taken to have been cognisant of the transaction, and to have acquiesced in it, so as to be bound by it even if there had been any irregularity in the mode by which it was carried into effect; that the Appellant's arrangement with the directors was beneficial to the company and prudent on the part of the directors; that long acquiescence in it, and the changes that had been made in the mode of conducting the business of the company—changes effected without notice to the Appellant—entirely released him from any connection with the company; and that there was not now any debt existing which had been due from the company when he was allowed to retire from it.

(1) 31 Beav. 365. (2) 31 L. J. (Ch.) 861.
(3) 34 L. J. (Ch.) 321.

For the Respondent *Evans* it was contended, that the call of £4 per share made in November, 1848, was irregular, and consequently did not confer on the directors power to forfeit the shares for disregard of it; that the compromise made with the Appellant, not being in accordance with the *Chippenham* arrangement, was *ultrà vires* of the directors; that the alleged forfeiture declared as to the Appellant's shares in 1849, was not a *bonâ fide* forfeiture, but a mere machinery employed to carry into effect an invalid agreement; that this agreement could not have been adopted by the other shareholders, who had no notice of it, and that the agreement was not entered into for the purpose of promoting the objects of the company.

For the Respondent *Hughes*, who adopted the reasons of his Co-respondent, it was, in addition, contended, that the Appellant, by being a shareholder of the company, was liable to its debts, and (unless with the consent of the creditors of the company) could only be released from such liability by having ceased for three years to be a shareholder of the company, and that he had not so ceased, because his retirement was not warranted by the provisions of the deed of settlement.

The following cases were cited and commented on in the course of the arguments: *Brotherhood's Case* (1); *Belhaven's Case* (2); *Stanhope's Case* (3); *Stewart's Case* (4); *Spackman's Case* (5); *Carlisle* v. *The South-Eastern Railway Company* (6); *Nicol's Case* (7); *Prendergast* v. *Turton* (8); *Clegg* v. *Edmondson* (9); *Clark* v. *Hart* (10); *Taylor* v. *Hughes* (11); *Bargate* v. *Shortridge* (12); *Ex parte Brown* (13); *Morgan's Case* (14); *Lawes' Case* (15); *Bennett's Case* (16); *Barton's Case* (17); *The Society for the Illustration of Practical Knowledge* v. *Abbott* (18); *Oakes* v.

(1) 31 Beav. 365; 8 Jur. (N. S.) 926.
(2) 3 De G. J. & S. 41.
(3) 3 De G. & Sm. 198; Law Rep. 1 Ch. Ap. 161.
(4) Law Rep. 1 Ch. Ap. 511.
(5) 1 Mac. & G. 170.
(6) Ibid. 689.
(7) 3 De G. & J. 441.
(8) 1 Y. & C. (Ch.) 98.
(9) 8 De G. M. & G. 787.
(10) 6 H. L. C. 633.
(11) 2 Jo. & Lat. 24.
(12) 5 H. L. C. 297.
(13) 19 Beav. 97–104.
(14) 1 Mac. & G. 225.
(15) 1 De G. M. & G. 421.
(16) 18 Beav. 339; 5 De G. M. & G. 284.
(17) 4 Drew. 535.
(18) 2 Beav. 559.

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Turquand (1); *Beresford's Case* (2); *Barton's Case* (3); *Leonard* v. *Leonard* (4); *Longridge* v. *Dorville* (5); *Clarke* v. *Dickson* (6); *Sanderson's Case* (7); *Hitchcock's Case* (8); *Sutton's Case* (9).

June 23. LORD CRANWORTH:—

My Lords, this case, which occupied some time in its discussion a few weeks ago, arises under the *Winding-up Act*, upon the winding up of the *Agriculturists' Cattle Assurance Company*. That company was formed in the year 1845, under the *Joint Stock Companies Act* then in force, the 7 & 8 Vict. c. 110. The company was duly registered according to that Act on the 1st of September, 1845. Its nominal capital was £500,000, divided into 25,000 shares of £20 each, and it commenced business in that year; 300 shares were allotted to the Appellant, on which he paid £300, as required by the terms of the association. A deed was duly prepared as required by the statute. Under that statute the incorporation was not made, as it has been under a subsequent statute, simply by registration of the document, but a deed was required to be executed. That deed was executed in this case; it was executed by the Appellant in the month of November in the same year, 1845. In the year 1847 he became purchaser in the market of 400 more shares. On the 1st of February, 1848, a call was made of £1 per share, and that call was duly paid by the Appellant; and on the 3rd of August, 1848, a second call of £1 per share was made, which he did not pay.

About this time it appears that great losses occurred in the business of the company; and there was great division of opinion amongst the shareholders as to whether it would be prudent to continue to carry on the business, or whether they ought not rather to have the business wound up and so put an end to. These discussions took place, and an action was brought against the Appellant for the amount of that second call. But while those

(1) Law Rep. 2 H. L. 325.
(2) 3 De G. & Sm. 175.
(3) 4 De G. & J. 53.
(4) 2 Ball. & Beat. 179.
(5) 5 B. & Ald. 117.
(6) El. Bl. & El. 148.
(7) 3 De G. & Sm. 66.
(8) Ibid. 92.
(9) 3 De G. & Sm. 262.

discussions were going on, a special general meeting of the company was duly called, as had been suggested by some shareholders on the 2nd of November, 1848. I take it now as stated by the Appellant, which, however, is completely borne out by the evidence. At that meeting, after a long discussion, it was proposed that a call of £3 per share should be made by the directors of the company, and that those of the shareholders who were desirous of leaving the company should pay a part of that call, and that the shares which they held respectively in the capital of the company should be declared forfeited for non-payment of the rest of the call. And in order that this proposal might be considered by the shareholders of the company, a resolution was passed that the meeting be adjourned, to be held at the *New Hall, Chippenham*, and that all legal proceedings then pending against the shareholders in respect of the August call should be stayed till after that meeting; and that notice should be given at the general meeting of the proposal made by a considerable body of shareholders present, either personally present or represented at the meeting, in order that the opinion of all of them might be taken.

My Lords, in conformity with that resolution a circular of the 4th of November was sent to every shareholder, the particulars of which it is necessary to state, though not perhaps quite at full length. It was dated at the office of the company, *Chatham Place, Blackfriars*, 4th November, 1848, and it was thus:—

"SIR,—I am instructed by the directors of this company to inform you that the enclosed propositions were made by a considerable body of shareholders at the special general meeting held yesterday."

That was a mistake. It was the 2nd of November. But that is immaterial.

"And we request that you will sign the accompanying form, should you wish to retire from the company upon the proposed terms. The special general meeting has been adjourned to be held at the *New Hall, Chippenham*, on Monday, the 13th instant, at twelve o'clock at noon, precisely; and in case you should not attend, or return the accompanying form, duly signed, on or before that date, you will be held as declining to concur in the propositions submitted to the meeting."

Then the terms are given, to which I shall have to call your Lordships' attention more in detail. I will, therefore, now only say that the proposition made was in substance this, that a call of £3

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per share should be made; and that shareholders wishing to retire might do so on paying certain specified proportions of that call. Persons holding only a small number of shares, under 100, were to pay £2 10*s.* per share; above 100 and under 200 to pay £2 per share; 200 and under 500 to pay £1 10*s.* per share; and those who held 500 shares and upwards were only to pay £1 per share.

5 H.L. 608

The meeting was held at *Chippenham* on the day specified, namely, on the 13th of November; and at that meeting an agreement was come to, which was signed by several of the shareholders, the material parts of which are these:

"We, the undersigned, being shareholders of the *Agriculturists' Cattle Insurance Company*, do hereby testify our consent to a call of £4 per share being made by the directors of the said company, in addition to the first call of £1 per share already made, and we hereby severally agree to carry out the proposal made at a meeting held in *London* on the 2nd day of November instant, and hereunto annexed, and to pay to the directors of the said company, within one month from the date hereof, the amounts set opposite to our respective names, for moneys due on the calls already made, and for the rateable proportion of the said call of £4, to be made on the faith and understanding that the directors shall, in default of our not paying any farther or larger proportion of the call to be so made, cause a forfeiture of our respective shares so as to effect a dissolution of partnership as regards ourselves in the interest of the said company, and making a return, under the provisions of the *Joint Stock Companies Act*, of a list of shareholders of the said company exclusive of our names."

It went on to state the dates at which the payments were to be made. The date of this meeting being the 13th of November, a portion of the call, half I think, was to be paid immediately, and another half within a month; that would be on or before the 13th of December.

My Lords, on the 21st of November, in pursuance of what was so resolved, a call of £4 per share was made, and notice of that call was given by circular to all the shareholders. It is dated the 24th of November, 1848, and signed at the office of the company in *London*, and sent to every shareholder. And it is in the following words:—

"SIR,—In pursuance of a resolution of the board of directors of this company, held at the offices on the 21st day of November instant:—'That a call of £4 per share on the capital of the company be made, and that the same be payable, and paid on Saturday, the 23rd day of December next, at one of the under-mentioned banks,'"

naming certain banks, some in the country, some in *London*,

"'and that circular letters be sent to the shareholders accordingly.' You are hereby

required to pay on or before Saturday, the said 23rd day of December next, a call of £4 per share, amounting to £ [ ] on [ ] shares standing in your name in the books of the company, to any of the above-mentioned banks."

It is necessary to explain, the original proposal having been £3 per share, how it came to be made £4 per share. It appears that the call that had been made in August was one that was supposed to be, for some reason or other, irregular. It was suggested that it had been made too soon after receiving the other, and therefore it was proposed, as many shareholders had not paid the August call, to add £1 to the £3—making it £4—but that those who had paid the August call should only be called upon to pay the £3. That was the reason why what was originally £3 became £4.

That was explained to the shareholders in a circular on the following day, the 25th of November, in these words:—

"SIR,—By a previous post you will have received notice of a further call of £4 per share having been made by the directors of this company; and as it may create alarm among the shareholders that such an amount should be called for at the present time, the directors desire me to explain to you that this call has been made to the extent of £3 out of the £4, in furtherance of a proposition made by the shareholders to the directors at the special meeting held here on the 3rd instant (a copy of which proposition was sent you on the day following the meeting). With respect to the remaining £1 per share, the directors deemed it advisable, in consequence of doubts having arisen as to whether some technical irregularity did not exist in the notice of the call made on the 3rd of August last, to make that call over again, giving those shareholders who have paid it credit for the amount so paid as paid in advance of the present call, and allowing them interest thereon accordingly. Shareholders accordingly electing to remain in the company who have duly paid the call of the 3rd of August last, will be required to pay 10s. per share only, and those who have not paid that call, £1 10s. per share only on account of this last call of £4."

My Lords, the Appellant, I think, was not present at the *Chippenham* meeting; though whether he was or not is not important. At any rate he did not accede to the terms. That is all it is important to state. He was still of opinion, with a great many others, that the speculation was hopeless, and that the sooner it could be put an end to the better. He therefore presented a Petition to the Court of Chancery for the winding up of the company, stating circumstances which he thought a sufficient foundation for the prayer of that Petition. It was heard before the then Vice-Chancellor *Knight Bruce*, and His Honour dismissed the Petition. From that, Mr. *Spackman*, the Appellant, appealed to the Lord Chan-

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cellor, Lord *Cottenham*, who considered the case very attentively, and came to the same conclusion as the Vice-Chancellor, that no sufficient grounds had been made for winding up the company, and dismissed the Petition, I believe, with costs (1). That was done on the 19th of April, 1849.

In the meantime, I believe before the hearing before Vice-Chancellor *Knight Bruce*, certainly before the hearing before the Lord Chancellor, a fresh action had been brought against the Appellant in respect of the £4 call. The other actions had been stayed, and, I think, abandoned. To that fresh action the Appellant pleaded fraud, and a number of other pleas, which would be all bars to the action if established in point of fact; when the attempt to wind up the affairs became hopeless, then the Appellant, together with six other persons who are mainly concerned, seven in all, entered into a negotiation with the directors, through means of a very long correspondence, to be allowed to retire upon terms different from those which had been proposed at the *Chippenham* meeting. They differed mainly in this—that whereas by the *Chippenham* arrangement, if it had been carried into effect in pursuance of its terms, they would have had to pay £6725, it was eventually, after some discussion, agreed between these seven gentlemen and the directors that they should be allowed to retire from that company on the payment of £4000, and then they were to have their shares declared forfeited, and so get out of the concern by paying £4000 instead of £6725. That arrangement was completed after a great deal of discussion, and I confess it does not appear to me that there was any concealment attempted as regarded the transaction. I think the transaction was perfectly open as between these seven gentlemen and the directors. So far as that goes, there was no concealment as between them at all. First of all, a sum much less than £4000, I think £2500, was proposed, and then £3000, until at last they came to an agreement that they should be allowed to retire on payment of £4000.

Then the directors, at a meeting held on the 6th of June, came to this resolution:—

"It was resolved that, by reason of the neglect and refusal on the part of the under-mentioned holders of shares" (that is to say, the Appellant, and the six

(1) 1 Mac. & G. 170; 1 H. & T. 229; 18 L. J. (Ch.) 261.

others) "in the above company to pay the instalment or subscription of £4 per share which has been called for in respect thereof, under the provisions contained in the said company's deed of settlement, within two calendar months after the 23rd day of December, 1848, the day fixed for the payment thereof, the shares which are held by the said under-mentioned shareholders, or to which they are entitled in the said company, numbered opposite their respective names hereunder written, and all money paid to the said company thereon, and all the benefit and advantage whatsoever attending the same, shall henceforth be forfeited to the said company, and such shares are forfeited accordingly."

Then the numbers of shares are indicated. So that, substantially, an agreement was come to between those seven gentlemen and the directors that their shares should be declared forfeited upon their paying £4000, by certain instalments that were stipulated. The £4000 were paid at the times stipulated, the last payment being in August, 1849, and the names of these persons were, from that time, removed from the register, and the business was thenceforward carried on without them. But the terms of this arrangement were not communicated to the other shareholders.

After that date the company was carried on, first upon the original terms, and afterwards very material alterations were made in the terms of the company, which I shall presently have occasion to allude to more particularly. On the 20th of April in the year 1861, the company having become insolvent, an order was made for winding it up. The name of the Appellant was placed on the list of the contributories, but, on the 8th of July, 1864, the Master of the Rolls made an order that his name should be removed. The official liquidator (the manager under the old Act) presented a Petition to the Lord Chancellor complaining of that order, and the Lord Chancellor made the order which is now under appeal, reversing the order of the Master of the Rolls, and placing the Appellant's name upon the list (1).

My Lords, I have thought it necessary, even though the case had been so recently before your Lordships, to call your attention to a short outline of the facts, in order to make the view I have taken of this case more intelligible.

The Appellant rests his case on two grounds. First: he says that by the payment of the stipulated sum of £4000 by himself and the six other shareholders associated with him, he ceased both

(1) 34 L. J. (Ch.) 321. 11 Jur N 207

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at Law and in Equity to be a shareholder. That payment was completed on the 30th of August, 1849, and the Appellant contends that according to the provisions of the deed of settlement he thenceforth ceased to be a shareholder. Secondly: he says that whether the effect of that payment was or was not absolutely to discharge him, yet, in fact, he was never after the month of August, 1849, treated as being a shareholder; and the conduct of all those who continued to be shareholders was such as to preclude them before the winding-up order was made, and now to prevent the official liquidator, from raising any question as to the legal validity of the arrangement by which the directors assumed to have made him cease, by virtue of that payment, to be a shareholder from the end of August, 1849.

I will consider these two questions separately. And, first, was the Appellant effectually removed from his position as a shareholder by the payments completed in August, 1849, and made in pursuance of the arrangement with the directors in the previous month of June?

This question must be solved by inquiring whether, if on the 1st of September, 1849, any shareholder had disputed the validity of what had been done, and had instituted legal proceedings for compelling the directors to replace the name of the Appellant on the list of shareholders, the Appellant could have effectually resisted such proceedings.

It is certain that when the Appellant executed the deed of settlement he bound himself to become a partner for fifty years with the other persons parties to the deed, and that, without the consent of all his copartners, he could not retire from the partnership except in the mode stipulated for in the deed. The only mode provided by the deed whereby a shareholder may cease to be a shareholder (putting aside for the moment the clause of forfeiture) is by sale and transfer of his shares.

The mode of effecting a sale and transfer is provided by the 176th and some following clauses. By the 176th clause it is provided that any shareholder may procure any other person to become a shareholder in his place by selling and transferring to him his shares. But then, by the next two clauses, the shareholder so proposing to sell and transfer is bound to give notice to the

directors of his intention, and they are to certify to the shareholder their approbation or disapprobation of the person to whom the transfer is to be made; and, though it is not said in terms, that if they disapprove the proposed transferee no transfer can be made, yet that is plainly to be inferred. Supposing the directors to approve the person to whom the transfer is to be made, the shares sold are to be transferred to him in the mode approved by the directors, and he is to execute a deed of covenant binding himself to observe the rules and regulations of the company. When this has been done, and the shareholder selling has paid up all sums, if any, then due from him to the company in respect of the shares sold, he is thenceforth to cease to be a shareholder, and is entitled to a certificate from the directors that he is no longer a holder of the shares so sold. There are some slight variations in the mode of proceeding where the sale of shares is made (as within certain limits it may be made) to the company itself, but it is not necessary to observe upon them. I have adverted to these clauses only for the purpose of calling attention to the great anxiety manifested by the deed that no shareholder should retire without putting a solvent and respectable substitute in his place.

But besides this mode, by which the shareholder is enabled, if he desires it, and if the directors approve, to substitute another shareholder in his place, and so cease to be a partner, the deed contains provisions by which the company is enabled, by its directors, to get rid of any shareholder who fails to pay sums to the payment of which he may, under the terms of the deed, have made himself liable. The 125th clause provides, that upon the neglect of the holder of any shares to pay any instalment called for under the terms of the deed within two months after the day fixed for the payment, the directors may declare such shares to be forfeited.

It is under this clause that the Appellant contends he has ceased to be a shareholder. He neglected or refused to pay the £4 call made in pursuance of the *Chippenham* arrangement. The directors declared his shares forfeited, and so, as he contends, he ceased to be a shareholder. The question is, whether this was the result of what took place; whether if a shareholder had, in September, 1849, instituted proceedings to call in question the arrangement

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with the Appellant, he could have done so successfully? I am of opinion that he could.

The deed, it is true, gives to the directors the power of declaring a forfeiture of shares the holders of which refuse or neglect to pay their calls. But it is plain that this is a power intended to be exercised only when the circumstances of the shareholder may make its exercise expedient for the interests of the company, not a power to be exercised for the interest, or supposed interest, of the shareholder. This is plain from the very nature of the power, and it is made even more obvious from various provisions and stipulations contained in some other clauses in the deed. In the 125th clause, which confers the power of declaring a forfeiture, it is expressly stipulated that the directors, instead of declaring a forfeiture, may, if they think fit, enforce payment of the instalment, meaning obviously by means of legal proceedings. In the next clause (the 126th) they are empowered to restore the forfeited share to the holder on payment of a fine; and by the 182nd clause, the directors are empowered to sell forfeited shares, but only so many of them as shall be sufficient to raise the sum for non-payment whereof the forfeiture was incurred and the expenses, and all shares not so sold are to revert and be restored to the person who held them at the time of the forfeiture.

These provisions are strong to shew that the power to declare shares forfeited was intended only to give to the directors additional means of compelling payment of calls, or other money due from the shareholder to the company by virtue of the deed. The shares are, in substance, made a security to the company for the money from time to time becoming due from the shareholder. The duty of the directors, when a call is made, is to compel every shareholder to pay to the company the amount due from him in respect of that call; and they are guilty of a breach of their duty to the company if they do not take all reasonable means for enforcing that payment. In the present case it has never been even suggested that the Appellant was insolvent, that he was not perfectly able to pay the full 30*s.* per share, which was the amount of his call; and it was a plain breach of trust in the directors to take, in discharge of money due from the Appellant, shares over which they had power as a security only for the money due, but

which shares they knew to be valueless. They were bound, as trustees for the body of shareholders, to enforce payment of the whole 30*s.* per share, and for that purpose to take all proper legal proceedings, unless they *bonâ fide* believed that he was not in circumstances which would enable him to pay the sum for which he was sued, and there has never been even a suggestion that this was the case.

It was, however, strongly pressed in argument that the directors could not have successfully proceeded in the action which they had brought against the Appellant; the circumstances attending the call, it was urged, were such as to make it impossible for the directors to enforce payment of the sums called for; the call, it was said, was legally invalid and the Appellant had pleaded several pleas to the action on which, if the parties had proceeded to trial, it was contended he must have been successful, and so that it was a prudent course to come to some arrangement whereby the proceedings in those actions should be stayed.

This argument does not make the case of the Appellant at all better. Under the 120th clause of the deed, the directors are empowered to make calls on the shareholders within certain limits; and the four following clauses prescribe the course to be pursued when calls are made. That a call of at least 30*s.* per share, including the 20*s.* call in August, 1848, was necessary for enabling the affairs of the company to be carried on, is not, I presume, disputed. It was therefore the duty of the directors to make such a call, and to make it in the mode prescribed by the deed, so that they might be able to enforce its payment. If it be true, as I will assume it was, that the call actually made in pursuance of the *Chippenham* arrangement was not properly made, and so that the Appellant would have succeeded in the action brought against him, the proper course to be taken by the directors was, *primâ facie* at least, to abandon that call, and to make another which should be in all respects conformable to the deed. If such a valid call had been made, there could have been no difficulty in enforcing it against the Appellant. But such a course would have thrown on the company the costs which the Appellant had incurred in resisting the action. It might therefore have been a prudent and justifiable course on the part of directors acting for the company to come to

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terms with the Appellant by way of compromise, under the power for that purpose conferred on them by the deed of settlement.

The power on which the Appellant relies as justifying the directors in such a course, is that contained in the 198th clause of the deed. It is there provided—

"That when any shareholder shall refuse or neglect to perform or comply with any of the covenants, agreements, and provisions contained in the deed, and which on his part ought to be performed or complied with, it shall be lawful for the directors to commence and prosecute any actions or suits at law or in equity, and at any time afterwards to stay, compromise, or compound, any such action or suit." And the clause further provides, "that it shall be lawful for the directors to commence, carry on, and prosecute any action or suit against any person or persons on account of the property or funds of the company, or on account of any contract or engagement with or on behalf of the company, or for or on account of any other matter or thing concerning the rights or interests thereof, and at any time afterwards to stay, compromise, or compound, any such action, suit, or other proceeding."

5 H. L. 618

There is an earlier clause (the 164th) which also gives power to the directors in certain cases to make any compromise or composition with respect to claims made against or owing to the company, as they may think fit. I do not, however, advert farther to that clause, because I think it doubtful whether that clause is not confined to the case of disputes between the company and strangers, and, at all events, it does not carry the power of compromise beyond what is contained in the 198th clause. The question, therefore, is, whether the 198th clause justifies the directors in making the arrangement of the 6th of June, 1849.

5 H. L. 611

In order to justify the compromise under the first member of the clause, the Appellant must admit the validity of the call made upon him: for, unless the call was a valid call, he did not, by refusing to pay the sum called for, refuse or neglect to comply with any of the provisions of the deed which on his part ought to be complied with. This first member of the clause seems to be inapplicable in cases where there has been no breach of duty on the part of the shareholder, as would be the case if the call for which the action was brought was one which the Appellant was not bound to pay. The compromise must therefore be justified (if at all) under the second member of the clause, that which empowers the directors to bring actions against any person or persons in respect of any matter concerning the rights and interests of the

company, and afterwards to stay, compromise, or compound any such action. The situation of the parties was this:—The directors had brought an action to enforce a call, which there were strong reasons for contending was a call which they could not enforce. There was a strong probability that they would fail in the action. The Appellant had pleaded, but the cause had proceeded no farther. If the directors abandoned the action they would have to pay the Appellant his costs incurred up to and including his pleas; but then they might have made a fresh call for 30*s.*, under which the Appellant would have certainly become liable to pay that sum, *i.e.*, £1050 on his 700 shares. It might be a reasonable and prudent course for the directors to consent to stay the action, and accept £800, which was his proportion of the £4000, instead of abandoning the action, paying the Appellant's costs up to and including his pleas, and proceeding to make a fresh call. The company received from the Appellant less by £250 than could have been obtained from him by means of a fresh call; but, on the other hand, the company was absolved from all demand on account of the Appellant's costs, and was saved the necessity of making a fresh call, as to which there were some difficulties, and thus the company escaped all the risks of litigation. This would have been an arrangement, both in letter and in spirit, within the 198th clause, and I do not see that any one could have objected to it. But this, though included in the arrangement made on the 6th of June, 1849, was not the whole of it. The material part of the arrangement was, that in consideration of the payment of a stipulated sum, the Appellant's share of which was £800, he and the six other shareholders acting with him should cease to be shareholders, and this result was to be obtained by the directors declaring their shares forfeited for non-payment of the whole amount of the call made in pursuance of the *Chippenham* arrangement.

I have already intimated my opinion, that in thus using the clause of forfeiture, the directors were applying it to a purpose foreign to that to which alone they would be justified in acting on it. There was no real forfeiture such as the deed contemplated in the 198th clause. I do not attribute moral fraud to the Appellant, but the whole transaction was fictitious. As was said by Lord *Westbury*, there was *aliud simulatum, aliud actum.* That which

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the directors did was, therefore, what is called a fraud on the power, a breach of trust, to which the Appellant was a party. The circumstance that this use of it was connected with, and formed part of, a compromise which, so far as relates to the action, might be good, does not help the argument of the Appellant. The substance of the agreement was, that certain actions against the Appellant and others should be compromised on payment by them of a stipulated sum to the directors, they undertaking on their part to do that which I consider to have been a breach of trust in favour of the persons making the payment.

I have been looking at this case, it will be observed, as it would have stood if the disputed transactions had been called in question recently after they took place by a shareholder no party to them, and ignorant of all which had occurred. He would have been entitled to say:—"I became a shareholder, relying on the names of those who were engaged with me in this partnership; I delegated the management to certain directors with defined powers and duties; it was part of the stipulations of the deed of partnership that none of my fellow-shareholders should quit the partnership except by substituting in his place some other person approved by the directors;—this was, I thought, a sufficient security to me that, in the event of my being called on by a creditor who, having recovered judgment against the company, should proceed to enforce payment against me, I had solvent partners from whom I might obtain contribution; and now I find that, without any authority from me, you, the directors, have taken on yourselves to enable several of my partners to withdraw from the partnership by a proceeding which I never authorized." I confess that to such a complaint I do not see what answer could have been made.

But the other question remains to be considered. Assuming that the Appellant was not effectually discharged from being a shareholder by the arrangement in June, 1849, is it now open to the official liquidator, who may be taken to represent those who were shareholders at that time, and still remain so, to dispute what was then done? I have come to the conclusion that it is.

The act of the directors in cancelling the shares of the Appellant, though not warranted by the deed of settlement, would be valid if it was either previously authorized or subsequently ratified

by all the shareholders. There certainly was no previous authority from the shareholders authorizing the directors to allow the Appellant to retire on the terms agreed on in June, 1849. It is equally certain that there was no express subsequent ratification. But the Appellant contends that there was, on the part of all the shareholders, such acquiescence as amounts to approval and confirmation. He contends that the shareholders so conducted themselves as to have put it out of their power, long before the winding-up order, to dispute the validity of what had been done by the directors. In order to sustain such an argument, it is incumbent on the Appellant to shew, in the first place, that all the shareholders knew, or must be deemed to have known, that he had been allowed to retire in a mode not authorized by the deed, and on terms not communicated to them. The first thing, therefore, to be done is to examine the evidence critically, in order to ascertain how far it does or does not shew knowledge, or means of knowledge, in the shareholders on this subject. The evidence bearing on this part of the case consists, first, of the circulars addressed to the shareholders relating to the *Chippenham* compromise; and, secondly, of that relating to the acts of the company subsequent to the retiring of the Appellant.

By a circular of the 18th of October, 1848, notice was given to every shareholder that a special general meeting would be held on the 2nd of November then next, at which it would be considered how far it would be practicable and desirable to permit certain shareholders to retire from the company on certain terms. The special general meeting was held on the 2nd of November; and another circular of the 4th of November informed every shareholder what the terms were which had been proposed at that meeting by the shareholders who wished to retire. They were as follows:—

"*Agriculturists' Cattle Assurance Company.*

"Terms proposed by shareholders who wish to withdraw from the above company:—All calls to the present time to be paid up. That a call of £3 per share be made on the capital stock of the company, and that the directors be empowered to forfeit shares of retiring shareholders on payment by them, in proportion to the number of their shares, as follows:—Holders of shares under 100 to pay £2 10*s.* per share; holders of 100 shares and under 200, to pay £2 per share; holders of 200 shares and under 500, to pay £1 10*s.* per share; holders of 500 shares and upwards to pay £1 per share. That 10*s.* only of the above call be paid by share-

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holders remaining in the company, or a sum equivalent to that amount, be provided as a guarantie fund for the security of retiring shareholders. That a committee of retiring shareholders be appointed with the directors to guarantee the funds received from retiring shareholders being paid in liquidation of present liabilities."

The same circular informed every shareholder that the meeting had been adjourned, to be held at the *New Hall, Chippenham*, on the 13th instant.

I do not find evidence to shew that notice was sent to the shareholders of what was resolved at the adjourned meeting. But on the 24th of November notice was given to every shareholder that the directors had, on the 21st instant, made a call of £4 per share. This, however, was followed by another circular on the next day, which gave notice to every shareholder that if he *elected to remain* in the company he would only have to pay 10s. per share if he had paid the August call, or £1 10s. if he had not. I think every shareholder would almost necessarily infer from this circular that if he *did not elect* to remain in the company, he might, so far as the special general meeting could authorize it, retire on the terms indicated to him by the circular of the 4th instant, unless those terms had been in any manner altered or modified by the adjourned meeting at *Chippenham*. He would, however, also know that the authority so given, if it was given, by the general meeting was *ultrà vires*, and would not be binding on him unless he acquiesced. I do not find evidence of any farther communication to the shareholders in general of an intention to allow any of their body to retire; but about four months after the Appellant had been allowed to retire, two balance sheets of the affairs of the company were duly prepared and audited in accordance with the provisions of the deed, the one for the half-year ending the 31st of December, 1848, and the other for the half-year ending the 30th of June, 1849, and a copy of them was, as provided by the deed of settlement, forwarded to every shareholder, together with the auditor's report, previously to the general annual meeting of the company in November, 1849. These balance sheets informed every shareholder that, in the half-year ending on the 31st of December, 1848, shares had been cancelled to an amount which reduced the sum of £52,400 payable on the £4 call by a sum of £11,310 10s.; and that in the half-year ending on the 30th of

June, 1849, there had been farther cancellations of shares, reducing the claim of the company in respect of the £4 call by a sum of £13,857 10s.

The important question is, what information as to the cancellation of shares did these balance sheets communicate? If they conveyed information that the directors had been taking on themselves to cancel shares to a very large extent in a manner not warranted by the deed of settlement, and on terms not communicated to the continuing shareholders, then I think that the subsequent conduct of the shareholders was such as to preclude them from saying that the retiring shareholders had never ceased to be shareholders. They knew that the directors were carrying on the business of the company with a greatly diminished number of shares and shareholders. If the affairs of the company should be unprosperous, this would be a disadvantage to those who remained, for the losses would have to be borne by a diminished number of partners. If, on the contrary, the business should prosper, the reduction of the number of shares would probably add materially to the profits of the shareholders who remained. In such circumstances I should be strongly inclined to hold that mere passive acquiescence would preclude the shareholders from afterwards contesting the validity of the cancellations. It would be a dishonest act on their part to allow the directors to carry on the business as if the company consisted only of the reduced number of shareholders, and then, if its affairs should turn out unfavourable, to insist on the invalidity of the cancellations by which they knew that shareholders had retired, and were therefore for ever precluded from claiming to be shareholders if the affairs should turn out prosperous. But here there was not mere passive acquiescence. During the six or seven years which followed the retirements in June, 1849, important changes were made in the terms of the partnership, materially affecting the interest of all who were to be treated as shareholders. I will only advert to two of them. By the original deed of settlement there was no power of borrowing money; but by changes made in it after 1849, under the 27th clause, powers were given for borrowing, first, £15,000, and afterwards £10,000 more, and these sums, or nearly all of them, were actually borrowed, and so became charges on the company and its

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shareholders. The original deed provides, by clause 20, that every shareholder is to have notice of every special general meeting, at which alone changes can be made in the deed. But every continuing shareholder must have known that no notice would be given to those who had been allowed to retire, so that these important changes affecting his interest would be made behind his back. Again, in April, 1857, a dividend was declared and paid of £6 per cent. per annum on the paid-up capital of the company for the half-year ending the 31st of December, 1856. The continuing shareholders received this dividend, though they must have known that those who had retired would not be allowed to participate in the sum to be divided.

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Looking to all which was thus done, I should certainly hold that the conduct of the continuing shareholders amounted to a ratification of the illegal or irregular acts of the directors, provided it be clear that the shareholders knew that they were illegal or irregular, that is, knew that they were acts not authorized by the deed, and not done in pursuance of the notice given to every shareholder by the circular of the 4th of November, 1848. The important question is, whether the information communicated to them did communicate this knowledge. I have, but not without reluctance, come to the conclusion that it did not. Every shareholder knew that, under the 125th clause of the deed, the directors had in certain circumstances the power to declare shares forfeited, and that it might become their duty to exercise that power, and to cancel the shares. But, farther, every shareholder knew that it had been proposed at *Chippenham* to enable shareholders to retire on complying with certain terms, the particulars of which had been communicated to him by the circular of the 4th of November, 1848. From the very great number of shares which it was obvious from the balance sheets must have been cancelled, every shareholder must, I think, be presumed to have known that many shareholders had been allowed to retire according to the proposals the particulars of which had been communicated to him in November, 1848. Though never formally assenting to what was so proposed, he might be of opinion that it would be to his advantage to allow shareholders to retire on those terms, and there was nothing in the information communicated by the balance sheets to shew

that the terms on which shares had been cancelled, if they were not cancelled under the 125th clause of the deed (and this, from the great extent of the cancellations, was hardly possible), were different from those of which he had been apprised by the circular to which I have referred. The absent shareholder might, therefore, have abstained from disputing the validity of the cancellations, either because he did not know that they were not validly made under the provisions of the deed of settlement, in which case he could not successfully have questioned them, or because, knowing that it had been proposed to allow cancellations of shares on certain specified terms, he would naturally suppose those terms to have been adhered to; and if they were adhered to, he might think it inexpedient to oppose the retirement of shareholders who retired on those terms. If the directors, or the shareholders who retired in June, 1849, had communicated by circular to every shareholder the terms on which it had been agreed that the retirements then sanctioned should be allowed, and if no objection had been made to what was proposed, I think that no shareholder could, at the time the winding-up order was made, have disputed the validity of the retirements. But no such notice was given, and there was nothing to inform absent shareholders that the cancellations referred to in the balance sheet of 1849 were not cancellations either under the ordinary provisions of the deed of settlement, or on the terms communicated to them by the circular of the 4th of November, 1849.

Some stress was laid in argument on the report of the auditor of the 12th of October, 1849, which accompanied the two balance sheets. The following passage in that report was relied on, I suppose, as shewing that the shareholders who were allowed to retire in June, 1849, did so on terms different from those which had been proposed at *Chippenham*. After adverting to the importance of paying all outstanding calls, the report proceeds thus:—"Many of the shareholders resisted payment, but, after much and expensive litigation, they found it their interest to make arrangements with the directors, which, if entered into a year before would have essentially saved delay and expense. They did at last what they might have done at first." It is very difficult to see how this passage can be made to bear on the present question.

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It is not at all obvious that it had any reference to the retirement of shareholders; but, if it had, then I think the words "They did at last what they might have done at first," would lead those to whom they were addressed to suppose that the retirements in June, 1849, had been on the same terms as those previously allowed.

It was argued that there was nothing like fraud or concealment in the conduct of the parties to the arrangement in June, 1849. But in order to bind the absent shareholders, it is not enough to say that there was no concealment. The Appellant and the directors knew that unless they informed absent shareholders of the terms on which the shares of him, and the others who retired with him, were cancelled, those absent shareholders would be altogether ignorant of them. It is not necessary to impute to the Appellant any fraudulent intention to conceal what had been done; but he must have known that there was nothing in the documents communicated to absent shareholders which would inform them of the terms of the arrangement. I am ready to believe that if an absent shareholder had made inquiries of the directors, they would have told him the whole truth. But there was nothing making it the duty of the shareholder to institute any such inquiry, so that he has a right to say that the facts, if not communicated to, were concealed from him.

It was said that all the facts must have been known to the auditors, and that they being appointed by the shareholders must be treated as their agents. The auditors may be agents of the shareholders so far as relates to the audit of the accounts. For the purpose of the audit the auditors will bind the shareholders; and, attending to the language of the 107th clause of the deed, it may be that any special matter contained in their report as to the state of the accounts and the assets of the company must be considered as having come to the knowledge of every shareholder. But with respect to the two balance sheets reported on by the auditor in October, 1849, I can see nothing even tending to shew what were the terms on which the Appellant had been allowed to retire.

On these grounds, which I have endeavoured to state concisely, I have come to the conclusion that the Order of Lord Chancellor

Westbury was right, and so that this appeal ought to be dismissed; but, considering the great difference of opinion which has existed on this and other similar cases among the highest authorities, I think there ought to be no costs.

LORD ST. LEONARDS:—

My Lords, the question before the House is, whether Mr. *Spackman* is to be a contributory in the winding-up, under the Court of Chancery, of what is still called the *Agriculturists' Cattle Assurance Company?* It comes before us in a singular shape, inasmuch as although the dispute is between the company as represented by the official manager, in whom is vested all the property of the company, and whose duty it is to administer the funds and to pay the debts; yet the creditors' representative is a party to the appeal. He upon this occasion contents himself, in his printed case, with the defence of the official manager. The counsel for the latter, however, appear to me to have preferred arguing the case as if they represented not the company for whom they do appear, but the creditors for whom they do not appear; indeed, the junior counsel carried his argument to this extent, that a shareholder in a case like this cannot have any equity; he can only quit the company in one of two ways,—by a legal transfer, or by a legal forfeiture. In *Brotherhood's Case* (1), the first on this point, I observe that the counsel for the creditors opened the case, and were followed by the official manager. I think that the defence rests with the counsel of the latter. Indeed, there is not a creditor remaining who was such when *Spackman* was allowed to withdraw from the company, so that new creditors cannot, in my opinion, establish any claim against him, although they might obtain a benefit if the company could compel a contribution from *Spackman*. I dismiss, therefore, from consideration altogether any claim set up on the part of the creditors, or by the official manager on their behalf. In my opinion the question to be decided is as between the company and *Spackman*. But we must not be misled by the title of the company. Long after *Spackman* had been allowed, whether legally or not, to withdraw from the company, the most important parts of the deed of partnership were altered, without, of course, any concurrence of

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his. Borrowing powers were introduced, and have been acted upon, and many other important alterations were made in the deed, more especially in "the object and business of the company," which were largely extended, and included objects requiring large capital and experienced directors, and secretaries, and solicitors, and actuaries, and agents of all sorts. The company did not allow its title to be expanded with this increase of business. "*The Agriculturists' Cattle Assurance Company*" but feebly describes a company with its new powers, and yet this is the company to which the Respondent desires to introduce the Appellant as the very company from which he withdrew so many years ago. On the 2nd of November, 1848, when the arrangement was first made for the withdrawal of members, there were 155 persons holding 13,100 £20 shares, and now, notwithstanding the creation of 25,000 preference shares under the powers newly created by the company, the contributories are stated to be, I think, thirty-nine.

Now that we understand the position and the claims of the Appellant and the Respondent, we may enter into the consideration of the facts upon which our resolution must depend.

The deed of settlement authorized the directors, upon non-payment of calls, to declare them forfeited, or to compel payment of them, and when they altered the deed in 1855, power was given to forfeit the shares and to enforce payment of the instalment, and forfeited shares were to be cancelled. They were authorized to sell forfeited shares, but not more than sufficient to pay the calls, and the remaining shares were to revert to the owner. The directors had power to discharge the forfeiture, and restore the shares to the holder on his paying such fines as the directors should think fit. Power was reserved to two special general meetings to dissolve the company.

The company commenced their operations in 1845, and as early as 1848 the losses exceeded the assets (independently of unpaid capital) by £17,000. Lord *Cottenham*, in 1849, observed that the capital of the company was not all realized by calls, but remained outstanding on the liability of the parties who had engaged to furnish the capital as it was required; in fact, they were the holders of the capital to the extent of the shares they had taken until it was required by the company. This explains the first arrange-

ment. In order to meet the demands of the company a first call of £1 a share was made, and that was followed by a second call of £1 a share. The first call was generally paid. Amongst those who paid the second call was a Mr. *Brotherhood*. Amongst those who declined to pay it, although they had paid the first call of £1, was Mr. *Spackman*, the Appellant. Actions were brought against shareholders who resisted the second call. The shares were of no value in the market. In this state of the affairs of the company the shareholders formed two classes, one which desired to carry on the concern and considered the shares valuable, the other which desired altogether to withdraw from it. This led to what is termed the *Chippenham* arrangement. It was agreed, with full notice, as it was considered, to all the shareholders, that those who desired it should be allowed to withdraw upon payment of certain sums, upon a scale according to the number of shares they severally held, in satisfaction of a call to be made, and that a call should be made, which was ultimately fixed at £4, and included the second call of £1, but was not to be wholly paid, and the portion left unpaid was to enable the directors, according to the arrangement, to declare a forfeiture of the shares of the retiring members. This was carried into execution. Ten shillings only of the call were to be paid by shareholders remaining in the concern, or a sum equivalent to that amount was to be provided as a guarantee fund for the security of retiring shareholders. This was a *bonâ fide* arrangement, and the shareholders who desired to carry on the concern never attempted to disturb it. The forty-two retiring members, holding 4354 shares, paid under this arrangement £5245, but they agreed at various times to the terms proposed, and to the time of carrying the same out. Several of them made the arrangement after the 13th of November, 1848, the day originally appointed, and two of them as late as January or February, 1850, and their shares were declared to be forfeited under the *Chippenham* arrangement. The directors repeatedly waived the time originally appointed for retiring members to withdraw and pay. The continuing members were thus enabled to carry on the concern, for, in fact, they were not bound to pay even the 10*s.* a share upon the £4 call, but only to provide an equivalent sum to protect the remaining members from the then present liabilities. It should be kept in view that no call was

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made by the company or by the directors before the year 1855, except the calls already mentioned.

In order to guard against the possibility of the forfeited shares once more vesting in the retiring owners, they, with the concurrence of the directors, transferred their shares to paupers, and gave the directors a regular deed of indemnity for consenting to the arrangement, and then the shares were forfeited in the names of the men of straw, and registered accordingly. This, no doubt, was an illegal operation, and, in point of fact, the declaration of forfeiture was never made against the real owners, but still even that circumstance has not been held to vitiate the transaction after the lapse of time. No such difficulty exists in the case of the Appellant.

We may now consider the real nature of the *Chippenham* arrangement. All the shareholders were invited to come in, and if they had so pleased they might have had a voluntary winding-up. But they split into two parties. Those who desired to remain took care to make those who retired find capital for the carrying on of the business. The call of £4 was not properly a call, for it did not affect those shareholders who remained in the business; even the 10*s.* a share was only a guarantee against the outstanding debts. As far as the call affected the shareholders who retired, it was not a call to carry on the business for their benefit in common with the other shareholders, but a fund exclusively for the benefit of the latter, and they manifestly carried on the business with it. The transaction did not properly put an end to the partnership, but a certain number of the partners remained who were to carry on the concern and take all the profits, and pay the outstanding debts and future engagements with the aid of the contributions of those who retired,—a *bonâ fide* and reasonable arrangement, and one from which neither party, when executed, could depart. The retiring members who paid could not claim either the repayment of their money, or any right to subsequent profits, nor could the company any longer charge them as co-partners. Their machinery might not have enabled them to carry out this arrangement legally, unless they had all, in effect, consented to or acquiesced in it; but time ran against any shareholder, although he had not accepted the proposed arrangement or expressed any

acquiescence in it. And the binding nature of the contract in 1862, after the winding up of the company in 1861, was established, first, by the Master of the Rolls, who, relying upon the subsequent dealings of the company and the knowledge of all parties, and more especially the time which had elapsed, held that *Brotherhood* (1) was not a contributory in the winding-up. The costs were to come out of the estate. From this decision the official manager appealed to the Lords Justices, and the appeal was dismissed with costs, which again were thrown on the estate. Lord Justice *Turner*, in giving his opinion, made an important statement, in which I entirely concur. He said that (2) "the fair test of the question whether a person ought to be held to be a contributory or not was this, whether he could have been compelled to contribute in equity if the number of partners had not prevented that remedy." He was satisfied that a Court of Equity would not have maintained a bill by any of the shareholders against Mr. *Brotherhood*, and would not have allowed him to be sued at law upon the deed for their or any of their benefits.

Although the House is not directly called upon to give any opinion on the *Chippenham* arrangement, yet I have found it necessary to consider it, because, in my opinion, it was the foundation of all the subsequent compromises and forfeitures of the company. The case was, I think, rightly decided.

I must now draw your Lordships' attention to the proceedings by and against Mr. *Spackman*. He attended the meeting at *Chippenham*, and refused to enter into the arrangement, and especially objected to forfeiture of shares. In December, 1848, *Spackman* and a brother, who was also a shareholder, presented a Petition for winding up the company, which was heard early in 1849 by Vice-Chancellor *Knight Bruce*, who dismissed it with costs, and upon appeal to Lord Chancellor *Cottenham*, the appeal was dismissed with costs; but the Lord Chancellor manifestly thought the *Chippenham* arrangement a binding one. The retiring members, he observed, were permitted to retire on terms beneficial to them, and beneficial also, he must presume, to those who offered the terms. All the facts were before the Vice-Chancellor and the Lord Chancellor, and they treated the arrangement as a binding

(1) 31 Beav. 365. (2) 31 L. J. (Ch.) 867.

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one. Both parties, the one who still desired to withdraw, and the other who desired to remain and carry on the business, were naturally led to believe that their common object could be further accomplished by an arrangement between them. Both parties, as we shall see, acted upon this belief, and neither attempted to disturb it. Too little weight has, I think, been given to these proceedings.

Now one leading question which this House is called upon to consider is, whether the arrangement to which I am about to call your Lordships' attention between *Spackman* and the company was a *bonâ fide* and open one, or a concealed and fraudulent one. He had attended at the *Chippenham* meeting and openly declined to enter into the proposed arrangement. The company brought actions against him for the fourth call, which he defended, and no doubt would, in my apprehension, have succeeded in the defence; but instead of entering into any secret or fraudulent agreement with the company, as composed of those shareholders who remained in it, he sought a public and, of course a *bonâ fide*, an adverse winding up of the company, and persisted in carrying his object before the Appellate Tribunal at the risk of costs. Now, what would success have done for him? It would have put an end to the company, (but not prevented the establishment of a new one); and all the outstanding debts would have been paid, and the shareholders have been freed from farther liability. But this could only have been accomplished by *Spackman*, in common with his brother shareholders, paying in full all calls required for payment of the creditors, and of the working of the winding-up. A plainer proof of fair dealing with the company could not be shewn. Success in his movement could afford him no benefit beyond what he sought, the payment of the full and fair portion of his liabilities, and his legal discharge as a shareholder in the company. From this conduct we shall find, I think, he never swerved. In regard to the important question which we have to consider, whether the shareholders generally had notice of the proceedings between *Spackman* and the company, the action against him was a *lis pendens*, and his Petition for winding up was another, which fixed every shareholder, however inattentive to the working of the concern, with notice of the litigation between their

company and *Spackman*. If, therefore, we find that the action is compromised, and that *Spackman* failed in his attempt to wind up the company, and yet quitted it upon a compromise of which the company availed itself without complaints for upwards of twelve years, and even up to the actual winding-up under the Court, it will be difficult to establish an ignorance of the compromise by any shareholder which will enable the company when broken up to establish their right to include *Spackman* amongst their contributories. With the knowledge fixed upon them they were bound to inquire where the thousands came from by which their trade was carried on, and who were their partners during twelve long years. It should be borne in mind that the company, by their official manager, challenged the transaction with *Brotherhood* as well as that with *Spackman*.

We may now consider the actual arrangement between *Spackman* and the directors. They were, in fact, a continuation of the *Chippenham* arrangement, and were so treated by the counsel of the Respondent in his argument at the Bar. The directors went on making compromises; and sums classed under payments for cancelled shares were mixed up with payments from *Spackman* and those who acted with him.

In consequence of the winding-up Petition of the *Spackmans*, fresh actions were immediately commenced against them, and those acting with them, for the £4 call, but with a notification that a less sum would be accepted; and the directors called a special general meeting to consider the general affairs of the company, and the meeting was held accordingly. A treaty then commenced between the directors and *Spackman*, and his friends, for their retiring, and they offered £2500, £3000, and ultimately £4000, which latter sum was accepted, for the calls due and their shares. A new company was in contemplation, and the basis of it was that of introducing influential agriculturists on the directory, and procuring new capital by the means of shares. These proceedings occupied from the 19th of April, 1849, to the 6th of June, 1849, with a long correspondence between the solicitors of both parties, and references to the directors, and to counsel for advice. In a letter of the 31st of May, 1849, from the solicitor of the company to the solicitor of the *Spackmans*, he stated that no time should

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be lost in carrying out the arrangement, as everything depended upon their moving promptly to preserve the company. The moneys paid by the retiring members, amounting to many thousands of pounds, saved the company. On this 6th of June, 1849, in pursuance of the plan agreed upon, the directors declared the shares of *Spackman* and the others forfeited. The actions were to be stayed, and were abandoned; and the directors and the other parties were to execute a deed to carry out the agreement. The £4000 were to be paid, in certain proportions agreed upon between themselves, by the shareholders retiring; and the Appellant's share was £800. A deed of the 26th of June, 1849, was accordingly executed by the company, and the Appellant and others, by which the latter released all their rights to the forfeited shares and to future profits, and the company covenanted not to do any act to revest the forfeited shares in the owners, or to charge them with more of the past calls or any future call. *Jacob Carpenter*, who had agreed to the *Chippenham* arrangement at the time it was made, was a party to this deed. The £4000 were paid by instalments according to the deed.

In the share register books of the company, corrected to the 1st of November, 1848, the Appellant's name is contained as a shareholder with his 700 shares. A proper return was made to the Registrar of Joint Stock Companies, and accordingly the Registrar, on the 8th of June, 1849, registered, amongst others, the acquisition by the company of the Appellant's 700 shares by forfeiture, leaving him none; and on the 1st of November, 1849, the list of shareholders in the share register book of the company did not contain, nor did any subsequent list contain, the name of the Appellant, or of the other contributors to the £4000. The eight shareholders, including *Spackman*, the Appellant, who withdrew upon this occasion, held 2925 shares. After August, 1849, *Spackman* ceased to be treated as a member of the company. The shareholders who remained in the company formed the company, and carried on the business, and, as we have seen, enlarged and altered it just as they thought proper, until they were wound up in April, 1861. In April, 1857, these shareholders received a half-yearly dividend of £6 per cent. per annum; but of course no portion of it was paid to, or claimed by, the Appellant, or the other

contributors to the £4000. The auditor, in his report of the 12th of October, 1849, to the directors and shareholders, stated that many of the shareholders resisted payment, but after much and expensive litigation, they found it their interest to make an arrangement with the directors, which, if entered into a year before, would have essentially saved delay and expense. The cash accounts were regularly kept, and the moneys received from retiring members duly entered. No doubt the business was carried on with the aid of these payments. The company was insolvent, and no other call was made before 1855. After *Spackman* and his friends retired, nine other shareholders, who held 1245 shares, retired upon terms, and their shares were declared forfeited. Six others of the shareholders, who held 1500 shares, were directors when the *Chippenham* arrangement was made; and four of them, holding 400 shares, afterwards retired by transfer or forfeiture; the remaining two are on the list of contributories. Twenty-one others of the shareholders who held 2608 shares in 1855, 1856, and 1857, were, from death or insolvency, no longer members, and the forfeiture of their shares was declared. These deductions left but few shareholders in the company, but this continued course of dealing by the company after, and certainly on the foundation of, the *Chippenham* agreement, shews, if this appeal should fail, to what an extent litigation would be carried on, for the directors for the time being made contracts with shareholders for retiring upon such terms and at such times as they thought to the interests of the company. The directors were frequently changed, and of the eight directors when the £6 dividend was declared, not one remained when the concern was wound up; at that period there were only five directors, all appointed subsequently to the dividend. The special general meetings appear to have been attended by very few members. I have considered it necessary to give an outline of the numerous facts and proceedings in this case. The official manager, with a desire to enlarge the number of contributories, in June, 1862, made his first attack upon *Brotherhood*, and, as we have already seen, failed in his attempt. In March, 1864, he proceeded against the Appellant.

Now, before I draw the attention of the House to the decisions upon this case, I think we may here consider it independent

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of those judgments. After an anxious consideration of the case, I am of opinion that the Appellant has not properly been declared a contributory upon the winding-up. I do not think that the question is, whether the agreement between the company, that is his fellow shareholders, and himself, was strictly legal, but whether it was *bonâ fide* and binding upon all, so as to prevent his being made a contributor in 1864. We must bear in mind that the claim is on the part of members of the company who remained such, against *Spackman* in 1864. The agreement between him and the company was, as it appears to me, thoroughly *bonâ fide*, and carried into effect openly and not secretly, and the remaining members, as representing the company from time to time, received the many thousands of pounds paid by the retiring members as the price of their being allowed to withdraw as members, and be no longer liable to calls or to debts; and the moneys so paid were applied to the carrying on of the business, which it clearly appears could not have been done without that aid. If we bear in mind that the application to charge the Appellant is to a Court of Equity, and that the *Winding-up Act* was intended simply to afford a remedy where the large number of a company before the Act rendered it difficult to obtain redress in Equity, and apply the test to this case suggested by Lord Justice *Turner*, we shall have to inquire what relief can be given to the remaining shareholders against those who, like *Spackman*, retired by agreement so long since. No shareholder complained before the winding-up. If any one had, what relief in Equity could he have obtained? What could he have asked? Surely not to compel *Spackman* to return to the company. That, indeed, if obtained, would at once have led to a winding-up, and the money paid by him must, of course, have been returned to him. It was so manifestly opposed to the object and interest of the remaining shareholders to disturb the transaction, that we cannot be surprised at no attempt to disturb it. If the remaining shareholders before the winding-up could not have compelled *Spackman* to re-enter the company, I am of opinion that they cannot do so now for the purpose of making him a contributory for the payment of their debts contracted after he had, with their permission, withdrawn from the company. I can find no trace of fraud in the transaction

—no benefit even to the directors in which the other shareholders did not participate; and it is not pretended that the moneys received were not applied for the benefit of the company, nor, in my opinion, was *Spackman* answerable for the application by the directors of the moneys they received. The accounts appear to have been regularly kept, and the continual change of directors would, no doubt, have led to the discovery of any malpractices of their predecessors. But, so far from such a charge being made, at a general annual meeting of the company on the 3rd of December, 1851, after a statement of their cheerful prospects, and of the issue of £25,000 new preference shares, it was moved, seconded, and carried unanimously, "That the best thanks of this meeting be given to the directors for the able, persevering, and energetic manner in which they have conducted *all* the operations of the society." Not a word against one of their principal operations, viz., the sale to shareholders of the right to withdraw from the company. Secrecy I can find no trace of. All that can be said is, that the particulars of the arrangement with *Spackman*, for example, was not communicated to every individual shareholder, and, therefore, as it was *ultrà vires*, *Spackman* is properly made a contributor. Five shareholders of small amounts, resident in *Scotland*, filed affidavits, copies of each other, by which they swore they were ignorant of the arrangement with *Spackman* and the others from 1849 up to the winding-up; and a shareholder, described as a publisher in *London*, who had transferred his shares to another, and disputed his liability to be a contributory as settled by the official manager, also swore in like manner. Now, all these persons, of course, had knowledge of the *Chippenham* arrangement, and that was, in my opinion, carried out in the several later arrangements for withdrawal by shareholders. They were all, in the eye of the law, cognisant of the actions against *Spackman*, and of his Petition for the winding up of the company, and their negligence in not attending to the proceedings of the company whilst it was carried on with the moneys obtained by the very dealings of which they would now complain, cannot be listened to in a Court of Equity. It is absurd to suppose that they or the other shareholders could have obtained any relief against *Spackman*. In regard to the remaining body of the shareholders carrying on the

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concern, there never was any dispute between them and their various directors, and all must, in my opinion, be considered as having acquired full knowledge of all the proceedings. I agree that a strict hand should be held over directors, and that if they do an act *ultrà vires* it cannot be maintained against shareholders who had not notice of it; but individual shareholders cannot abstain from taking any part in the transactions of the company, and participate for years in the profits obtained by the company by their management, and then, when a crash comes, seek in Equity to set aside the very proceedings without which the company would have necessarily been wound up at an early period. Besides, after the judicial proceedings, they were bound to inquire; they knew that *Spackman* had attempted by legal means to wind up the company, and I should hold them bound, by implied notice, of his subsequent withdrawal by purchase from the directors. A man may become a contributory to a company by his acts, although he has not made himself legally a member of it. This is proved by many cases, as Lord *Denman*, C.J., observed in *Cheltenham, &c.*, v. *Great Western Railway Company* (1), all difficulties arising from not adopting the machinery of the Act of Parliament are got over by the conduct of parties who claim to be in the situation of proprietors, and are so placed accordingly. And this rule, may, to a certain extent, be applied to acts done by the company. Whether rightly or not, I find from the citations at the Bar that I have at least been consistent in my opinion on this subject. I refer to the cases cited at the Bar: *Taylor* v. *Hughes* (2), before me in Ireland in 1844, and *Bargate* v. *Shortridge* (3), in this House in 1855, in which I delivered my opinion upon the appeal.

There remains the question of time, upon which, without inquiring whether the acts done could be deemed valid when they were done, yet, as I am of opinion that all was done *bonâ fide*, without secrecy or any attempt to conceal the transactions, which, indeed, are not shewn to have been other than beneficial to the company, I am of opinion that neither the company, nor any shareholder in it, nor the official manager now before the House, can be allowed to open or set aside the arrangements, and to

(1) 2 Q. B. 281. (2) 2 Jo. & Lat. 24.
(3) 5 H. L. C. 297.

charge the Appellant as a contributor under the *Winding-up Act*. The time which has elapsed, and the conduct of the company during that long period, do not permit me to entertain any doubt upon this point. Your Lordships may be surprised to hear this opinion after my long examination of the other facts in the case; but I felt it necessary to establish the view which I take of those facts, and which authorizes me to give that operation as to time which is adverse to the claim of the official manager.

I have still to bring before your Lordships the adverse decisions in the Courts below in this case, which will render it necessary to refer also to the other decided cases upon contributories to this company, and then the whole case will be before the House. *Spackman's Case* came before the Master of the Rolls in June, 1864, and His Lordship held that *Spackman* could not be placed on the list of contributories; he considered the case to be governed by *Brotherhood's Case;* that the directors had power to compromise the actions; that there was no actual fraud; that the continuing shareholders must be treated as having a knowledge that *Spackman* had ceased to be a shareholder, which, indeed, was admitted in the argument for the creditors; and, finally, under all the circumstances, he held the time was a bar to any relief which the company might have obtained at an earlier period. From this decision there was an appeal to the Lord Chancellor, Lord *Westbury;* and he, in an elaborate judgment, reversed the decision at the Rolls, and authorized *Spackman* to be placed on the list of contributories. From this decision the case before us is an appeal. In the case of Lord *Belhaven*, in my opinion one much more difficult to deal with than *Spackman's Case*, the Master of the Rolls placed Lord *Belhaven's* name on the list of contributories to this company; but upon an appeal to the Lords Justices in April, 1865, this decision was reversed. Lord Justice *Knight Bruce* observed, that it seemed to him that the Master of the Rolls would have determined otherwise than he had done, and in favour of Lord *Belhaven*, but for the view he took of the Lord Chancellor's decision in *Spackman's Case*, which he, however, considered to be inconsistent with the claim of Lord *Belhaven*. The Lord Justice thought that there was not any such inconsistency, and that the judgment in *Spackman's Case* rested on suppression, concealment,

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and fraud, and that it was possible to decide in favour of Lord *Belhaven* without contradicting the judgment in *Spackman's Case*. Lord Justice *Turner* concurred, and observed that *Spackman's Case* did not rule the case before them. In *Spackman's Case* the transaction was described by the Lord Chancellor as a proceeding wholly collusive and unreal, and the judgment mainly, if not wholly, rested on that ground. The Lord Justice was of opinion that the 198th clause of the deed gave the power to the directors to compromise, in which opinion I concur; and the power to compromise must necessarily give power over the terms of compromise, and he saw nothing to prevent the release of a shareholder being made part of the terms. Upon this point we are not called upon to give any opinion. Time also was relied upon, and I cannot doubt that if this case had come before the Lords Justices standing upon its own merits, they would have supported the decision of the Master of the Rolls.

The question came once more before the Master of the Rolls in *Stanhope's Case* (1), in November, 1865. He treated it as similar to *Lord Belhaven's Case* and to *Spackman's Case*, and he expressed his approbation of the decision of the Lords Justices in *Lord Belhaven's Case*, and his disapproval of Lord *Westbury's* judgment in *Spackman's Case;* he could not reconcile the cases, and he therefore followed his own opinion, and held that the party before him was not a contributory. In December, 1866, this decision was reversed upon appeal by the Lord Chancellor, Lord *Cranworth*, who thought it impossible to find any distinction between the case and that of *Spackman;* he could not think there was any conflict between *Lord Belhaven's Case* and that of *Spackman*. In the former case there was no concealment; there was not, as Lord *Westbury* considered there was in *Spackman's Case, aliud simulatum, aliud actum*. Fully acting on and adopting the view taken by Lord *Westbury* in *Spackman's Case*, he reversed Lord *Romilly's* decision. The Lord Chancellor placed his decision upon the same grounds as those which governed Lord *Westbury's* judgment. That case, I believe, is to follow the fate of your Lordships' decision in *Spackman's Case*. There are two other cases upon this company before the House on appeal; but as I did not hear the

(1) Law Rep. 1 Ch. Ap. 161. 12 Jun 1879

arguments, I shall abstain from voting upon those appeals. In one of the cases the Master of the Rolls, contrary to his own opinion, decided without argument according to the opinion expressed by the Lord Chancellor in a prior case; and in the other case before the House, the Master of the Rolls held that it came within *Brotherhood's Case*, and refused to make the party a contributory.

I have thus brought before your Lordships the views taken by the judicial authorities upon Lord *Westbury's* reversal of Lord *Romilly's* decision in *Spackman's Case*. It has been considered as resting upon suppression, concealment, and fraud, and this is, I think, the true view of that elaborate judgment, in the conclusions of which I should agree if I saw the facts in the same light. The judgment rests upon the adoption by the Lord Chancellor of the contention of the official manager, that the alleged forfeiture was a proceeding wholly collusive and unreal; that it was a fraud upon the other shareholders; that there was a false statement, involving a fraudulent concealment of the truth; that it was a collusive contract; that this invalid transaction was concealed from the shareholders. These are selected from the judgment, which deserves a careful perusal, simply to shew upon what grounds it was mainly rested. The Lord Chancellor added, that he did not mean by his decision in any manner to question or depart from the principles laid down by the Lords Justices in their judgment in the case of *Brotherhood;* but, on the contrary, to pronounce a decision which was in strict conformity with those principles.

My Lords, I ask you to do precisely what Lord *Westbury* said he would do if he saw the facts of the case in the light in which we now see them; he tells you, in so many words, not to be misunderstood, that he did not mean by his decision in any manner to question or depart from the principles laid down by the Lords Justices in their judgment in the case of *Brotherhood;* but, on the contrary, to pronounce a decision in strict conformity with those principles. That is all I have to say. Act upon the principles laid down by the Lords Justices in the case of *Brotherhood,* and it is not possible, in my opinion, to come to a decision against the Appellant in this case. My Lords, I am not able to reconcile the decision given upon that occasion by Lord *Westbury* with the

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principles laid down by the Lords Justices in *Brotherhood's Case*. They had before them all the circumstances of the case, which, as I observed, were in my opinion more difficult to deal with than those in the present case. Lord *Westbury* considered that the alleged forfeiture of shares was a proceeding wholly collusive and unreal, the real transaction being an agreement that for £4000 the retiring shareholders should be released from all existing and future liabilities to the company. This was an abuse of the power of forfeiture, and a fraud upon the other shareholders. If a declaration of forfeiture really proceeds upon and is the result of a collusive agreement, but is entered by the directors in the books of the company as if it were a *bonâ fide* adverse proceeding, the entry is a false statement involving a fraudulent concealment of the truth; for the suppression of the truth is a form of falsehood, and falsehood is fraud; and it is impossible, under such circumstances of imposition on the other shareholders, that the shareholder who sets up the forfeiture can make a case of acquiescence, or derive any benefit from lapse of time, whilst the truth remains unknown. In these propositions the Lord Chancellor had condensed the arguments for the official manager, and to those propositions he gave his consent.

Now, it appears to me, with deference, that these cases do not, at this distance of time at all events, depend upon the legal validity of the forfeiture, but upon the *bona fides* of the transaction. The power of forfeiture was openly exercised only as a means to the end in view, which was to allow the shareholders to retire from the company upon payment of a contribution or fine to the company. The forfeiture, even in its imperfect operation, was the only way in which the real transaction could be brought before the company, as it existed from time to time, and the public, so as to be placed regularly on the register of shares by the company, and on the public register; and this was accomplished, and worked so well that the bargain really made between the company and the retiring shareholders was never disturbed for the many years which elapsed before the final crash. The bargains were fair ones, and the moneys paid were regularly carried to account; nothing was concealed.

In comparing *Brotherhood's Case* with *Spackman's*, now before

the House, it must be borne in mind that all the machinery which is now objected to as fraudulent and secret, and founded upon a fraudulent and illegal exercise of the power of forfeiture, was the work of the *Chippenham* arrangement at the special meeting of the company on the 13th November, 1848. The directors and *Brotherhood*, and other shareholders, entered into an agreement that the latter should pay certain sums to the directors, which included a rateable proportion of the £4 call, on the faith that the directors would, on the default of the shareholders to pay any farther portion of the call, cause a forfeiture of their shares, so as to effect a dissolution of partnership as regarded the retiring shareholders in the interests of the company, and make a return under the Act of a list of shareholders of the company exclusive of those retiring. These terms were fully carried into execution, and have been so far held binding as to save the retiring shareholders from being placed upon the list of contributories. They were treated as having been brought before the general body of the shareholders. It will be observed that the call was nominally for £4, which was not intended to be wholly enforced against the retiring shareholders, in order that the part to be left unpaid should enable the directors to forfeit the shares of the retiring shareholders. Of course the forfeiture was then, as at later periods, not a real proceeding, for the retiring shareholders had nothing to forfeit, inasmuch as the shares were worse than valueless. When, as in the army, a man has something of value to give up or transfer upon retiring from a position, he is properly represented as selling out; but here the shareholders had, upon retiring, to buy out. Every one of the steps which are now objected to were taken in the *Chippenham* arrangement, but the objectionable transfer of the shares to a pauper, and the declaration of forfeiture against him after he was registered as a shareholder, and the deed of indemnity to the directors for agreeing to the transfer, no doubt were not communicated to the shareholders generally. The knowledge fixed upon the shareholders in that case, of course, could not give validity to an illegal exercise of the forfeiting power, although it might prevent them from disturbing it.

I must now, once more, draw your Lordships' attention to the opinions expressed by the Lords Justices upon the appeal to them

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in *Brotherhood's Case*, in strict conformity with which the Lord Chancellor intended to decide. Lord Justice *Knight Bruce* thought that at an earlier period the transaction of 1848 might have been impeached, but it was not disputed until the winding up of the company; nor between 1848 and 1861 had *Brotherhood* been treated as a member of the company. For more than twelve years all persons concerned seemed practically to have treated the transaction as valid and effectual, and the Respondent as not a partner. The Lord Justice alluded to the alphabetical lists of shareholders during this period, those lists not including the Respondent's name. No notice was sent to him after the 31st of December, 1848. The dividend of April, 1857, was not paid on the shares forfeited under the arrangement of November, 1848. There was no debt due from the company to any creditor of the company who was a creditor before the 1st January, 1849, in respect of any debt due from the company on the 1st of January, 1849. In these circumstances, independently of the probability, or more than probability, shewn, he thought, by the evidence to exist, that in the year 1848 or 1849 every shareholder assented to the transaction, he agreed with the Master of the Rolls that it was too late to question it, and that the appeal should be dismissed with costs. Lord Justice *Turner* was of the same opinion. In referring to the facts, he referred to the transfer to the pauper, which he thought was invalid in Equity, and possibly at Law, subject to the question whether all the other shareholders had notice and assented to the terms of the arrangement. If it were necessary to decide the point, he was strongly disposed to think that the evidence was sufficient to establish such notice. The circumstance brought forth by the official manager, that some shareholders in the company had not paid deposits on their shares, and some of them stated that they did not receive notice of the proposed arrangement, was not, in his opinion, sufficient to rebut the presumption that the secretary did his duty. There were, however, strong grounds upon which the Order of the Master of the Rolls ought to be supported, and he did not, therefore, say more on the question of notice and assent. Upwards of twelve years had elapsed, and the arrangement was unimpeached, and *Brotherhood*, for all practical purposes, ceased, and was treated as having ceased, to be a member of the company. He then referred

to the facts that no notices were sent to him, and no part of the £6 dividend was paid to him, and the later alterations made in the deed of settlement of the company, and that it did not appear that any debts contracted while *Brotherhood* was a shareholder were then due from the company. And the learned Judge concluded by stating his view of the *Winding-up Act*, to which I have already called your Lordships' attention, and added that a Court of Equity would not have maintained a bill by any of the shareholders against *Brotherhood*, and would not have allowed him to be sued at law upon the deed for the benefit of all or any of them.

I have thought it right to bring fully before your Lordships the grounds upon which the Lords Justices decided upon the appeal to them in *Brotherhood's Case*. It appears to me that their judgment was founded upon the lapse of time and the acts of the company during that period, assuming that the transaction in 1848 was originally valid, and irrespective of actual notice to every shareholder being proved. There, as here, the forfeiture was used simply to carry out, not a real forfeiture, but the compromise between the company and the retiring shareholder, but there in a form open to objections which do not apply to this case. There, as here, the retiring shareholder had been treated for upwards of twelve years as no longer a member of the company; and these circumstances, coupled with the acts of the company, were held a bar to the claim to place the retiring shareholder on the list of contributories.

I cannot reconcile the decision of the Lords Justices with the judgment of the Lord Chancellor. Some reliance was placed by him on the circumstance that the facts in this case could not be ascertained by the official manager until he obtained access to the papers of the deceased solicitor of the company in the transaction with *Spackman;* but nothing is more usual than for a solicitor to retain the correspondence which goes through his hands; these letters were of no value, and could not have been kept back for any improper purpose. And some weight was given to the application of a considerable part of the £4000 by the directors in payment to themselves of fees, allowances, and law charges, which, in the existing state of the finances of the company, there could be little hope of their obtaining in any other manner. The company's

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balance at the bankers did not exceed £73. It does not appear to me that the retiring shareholders were responsible for the application of their money by the directors. Any improper application was adverse to their interests, inasmuch as they remained liable to the debts of the company, and they were anxious to be relieved from that responsibility. A misapplication of the fund was never alleged, and the payments in question were, no doubt, necessary to keep the staff at their posts. Lastly, the Lord Chancellor, in answer to facts relied upon by the Master of the Rolls, shewing that the retiring shareholders had not been treated as shareholders during eleven years, observed that all this was the result of the belief of the shareholders that the shares of the Respondents had been duly forfeited, and that they had *bonâ fide* ceased to be shareholders; and that belief was produced by misrepresentation and concealment of the truth by the directors, for which the Respondents were equally responsible. There is no proof whatever of the belief of the shareholders who remained in the company; they manifestly left the directors to sell out shareholders desirous of retiring upon the best terms they could obtain, and never objected to what was, for a few years, an important part, I may say, of the trade of the company; it produced many thousands of pounds obtained from the retiring members, without which the trade must have been altogether abandoned.

The Scotch shareholders who, in 1864, made the same affidavit, merely denied any knowledge prior to 1861 of the transaction of 1849, not that having knowledge of it they believed it to be a legal transaction, nor do they state that any one of them had any knowledge of any other trading by the company. They no doubt were aware that the law fixed them with notice of the legal proceedings by and against *Spackman;* and of course they were ignorant of the many thousands of pounds received from retiring shareholders with which their trade was carried on.

The result of my consideration of the case in all its bearings is, that the order complained of should be reversed. My view, as I have shewn your Lordships, is not unsupported by authority, but still I am aware that it may seem to be opposed to the opinions which have been expressed by several of my noble and learned friends. It was my duty to fully examine those opinions and the

grounds upon which they rested, and I have endeavoured to do so consistently with the respect which I entertain for their judgments and the regret which I should feel in differing from them in the present instance.

My Lords, it is perhaps time for me to close what I have to say, but I shall be forced to occupy a little more of your Lordships' time. I am placed in a singular and embarrassing position as regards this case. My noble and learned friends who heard this case had all, except my noble and learned friend opposite (Lord *Colonsay*), I will not say committed themselves, but they had all expressed themselves in judgments unfavourable to the Appellant. The Lord Chancellor had been counsel, and had succeeded in all the cases, and therefore he very naturally felt unwilling himself to sit upon the case. Therefore I was the only Law Lord who had expressed no opinion upon this case. And although I have, as far as I can do so, retired from public life, and do not without necessity attend the hearing of appeals, yet being the only Law Lord who had expressed no opinion upon the case, (and, indeed, had formed none, for I knew nothing of the case before hearing it,) it was thought only just to the Appellant that he should have at least one Law Lord present who had not been called upon to give any opinion on one side or the other. Now when the argument at the Bar closed I felt it my duty, in the course of a short conference with my noble and learned friends, to state what my opinion was, and the short grounds upon which it rested. But I was not aware till their opinions were printed and circulated among us what their present opinions were. I had not seen the opinion of my noble and learned friend which has been read to your Lordships, nor the other opinions which will presently be read; so far as my own opinion is concerned the Appellant has not had the benefit of my noble and learned friends seeing the grounds on which my opinion is formed before they formed their own deliberate judgments.

My Lords, when I came to look at my position with reference to this case I found that I stood somewhat in this position:—The appeal in this case was from Lord *Westbury's* decision. When I looked at that able judgment I entirely agreed with it, and I should at once have said so without any farther difficulty, only that it was my duty to make myself master of the facts, and when I

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sat down to a serious consideration of the facts I found myself compelled to come to the conclusion that the grounds upon which that decision was formed did not exist; that there was no fraud, no collusion, no concealment. In that I find that we are all agreed. My noble and learned friends are all agreed with me that there was no fraud, no collusion, no concealment. Therefore what I believed to be the ground of that decision, the ground upon which it was rested, and upon which alone it could stand, was really at an end. But then what do I find besides? My noble and learned friends, who retain an opinion adverse to the views which I have been submitting to your Lordships, now rely wholly upon that other ground of time, which, when I had removed (as I thought, and, as it appears, my learned friends agreed with me) the other grounds upon which the judgment under review solely rested, I supposed admitted of no fair discussion; and, in point of fact, if this case is decided contrary to the opinion I have taken the liberty of submitting to your Lordships, it must be decided upon what I must call a new ground, not on Lord *Westbury's* ground, but I should say in direct opposition to the ground upon which Lord *Westbury's* decision rested. Lord *Westbury* said, "I find fraud, I find concealment, I find collusion, I find everything wrong." And if that ground was sound, then his judgment was sound. But that ground is now given up by my noble and learned friends. In this position of the case I set myself last night to put down what my views were of that which is now the question before us, but which Lord *Westbury* did not make the question, namely, what is the effect of time upon this case now that we are all agreed that there was no fraud, no collusion, no concealment. And I have now to submit to your Lordships what my opinion is upon the effect of time.

My Lords, my object was to shew that the ground upon which the reversal of the Master of the Rolls' decree depended could not be supported, and that being removed I considered it to be clear that the Order itself could not be affirmed. Now I find that no attempt is made to support the grounds of fraud and concealment. My noble and learned friend who has just spoken takes a new view; he says it is not enough to bind the absent shareholders to say that there was no concealment. The Appellant and the

directors knew that unless they informed absent shareholders of the terms on which the shares of him and the others who retired with him were cancelled, those absent shareholders would be altogether ignorant of them. It was not necessary to impute to the Appellant any fraudulent intention to conceal what had been done, but he must have known that there was nothing in the documents communicated to absent shareholders which would inform them of the terms of the arrangement. But why, I ask, is such knowledge attributed to the Appellant? "I am ready," said my noble and learned friend, "to believe that if an absent shareholder had made inquiries of the directors they would have told him the whole truth." But there was nothing making it the duty of the shareholder to institute any such inquiry, so that he has a right to say that the facts, if not communicated to, were concealed from him. This I think is dangerous doctrine. My noble and learned friend who has not yet spoken disagrees with Lord *Westbury's* view as to fraud, he thinks the proceedings were *bonâ fide*, and that the parties acted upon their belief that the arrangement was within their competency, and that there was no intention to disguise the transaction, but he considers that knowledge should be brought home to every shareholder. He differs with Lord *Cranworth* as to the compromise. He would, I believe, reverse the decision in *Brotherhood's Case*. It is said by my noble friend who has spoken, that we must consider what was the right of any absent shareholder at the time of the transaction. The case has now a new aspect. Fraud is no longer imputed. All legal and other knowledge is imputed to the Appellant, but an absent shareholder is not bound to inquire. It may be thought dangerous doctrine that shareholders need not inquire for any number of years. I hold it to be clear, that if your Lordships decide against the Appellant in this case, that decision will be, as far as it goes, a reversal of that in *Brotherhood's Case*.

The main ground now relied upon is, that immediately on the arrangement being made an absent shareholder might have had relief. Let it be admitted; but look at the then state of affairs. What sane shareholder would have taken such a step? None did, and for a very good reason. Consider the case as it stood at the time of the first compromise, or even of the second. How

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difficult it is to maintain a hard and fast line. We are told what steps should have been taken. But at the moment the ship was sinking. The waters were yawning for her—without instant relief she would have sunk to the bottom of the deep deep sea. The Appellant and his comrades saved the sinking ship, and she walked, as it has been said, once more on the waters as a living thing. A hard and fast line would have operated to the ruin of the absent shareholders. But clearly there is no such hard line. It is right that the absent shareholders should not be bound by an act of the directors, *ultrà vires*, to which they have not consented. The cases clearly shew that although the act be *ultrà vires*, yet if the absent shareholders acquiesce they will be bound. But it is said they must know that it is illegal. Let us assume that to be so, yet we must inquire whether acquiescence cannot be fixed upon absent shareholders, not only by clear direct information, but by the course of things and their means of information. It should be borne in mind that of the absent shareholders many resided in various parts of *Scotland*, and did not answer the directors' letters, or even take part in the general meetings of the company. It would be impossible to prove knowledge by such shareholders. They left the directors to take their own course. But in this case the course pursued was the salvation of the company generally, and the absent shareholders took without scruple all the benefits of the acts now complained of. No shareholder ever did, and assuredly no shareholder ever would have challenged those acts, although the official manager has, as their representative, done so.

We must consider what rules govern this case. We are in a Court of Equity, and we act not merely as final Judges of Appeal in Equity but here we act also as a jury. I think if an ordinary jury were here I would satisfy them that what the shareholders never attempted to disturb the official manager cannot do. There are, as I shall shew, sufficient grounds to bind the shareholders without mere aid of time; but in this case time alone is a bar. The rule is, *vigilantibus et non dormientibus jura subveniunt*. Courts of Equity have always placed great reliance upon time. Even when the *Statute of Limitations*, making time a bar, did not apply to Courts of Equity, those Courts, by analogy, applied the same rules to claims in their Courts, but never held themselves bound

by the statutes. The new statutes, which did include Courts of Equity and equitable rights, expressly reserved the power of those Courts to act on the old rule of acquiescence, and did not take away their former jurisdiction on this head. In the case of *Sibbwing* v. *Bulcarres* (1), in which the Plaintiff sought to set aside the sale of a reversion, and the legal time of limitation had not elapsed, the Vice-Chancellor observed that it was the duty of the Court to act upon that presumption which a Court of justice most properly entertains against stale demands, and which can never be more properly applied than to a case like the present, where the burden of proof (as in this case) upon a most material point in controversy is thrown on the Defendant. The learned Vice-Chancellor was of opinion that there was not sufficient to resist the presumption in favour of the transaction arising from length of time. Justice and reason appeared to him to require that the bill should be dismissed with costs. I have looked through all the cases, and I can find none which would justify the dismissal of this appeal.

But this case does not depend upon time alone, it has the proof required by Equity, that the party whose right you desire to bar knew, or had means of knowledge, of the nature of the dealings which he now desires to be considered to be illegal. Now, in Equity (and we sit as a Court of Equity) it is sufficient to charge a man with knowledge that he had that before him which, if he had used due diligence, would have afforded the knowledge which he desires. This rule is applied with great severity by Courts of Equity, even against *bonâ fide* purchasers; for example, if the purchaser had a document with regard to another, and the latter would have disclosed an incumbrance, but he had not thought it necessary to inquire for it, he would be held to have implied notice of the charge, and implied notice is equivalent to express notice. Are we to hold that an owner of a £20 share in this concern, residing in the *Highlands of Scotland*, and wholly neglecting the interests of the trade in which he is interested, may sleep for twelve years perfectly silent, never inquiring, never complaining, but receiving all benefits and having no burdens, and that after that he may challenge transactions like those before us when he

(1) 3 De G. & Sm. 737.

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awakes? He must inquire whether he had not the means of knowledge which will bind him. No Court of Equity ought to assist a man who, after so long a slumber, attempts to throw upon another the proof that every shareholder knew the terms of a given transaction. As to actual knowledge and means of knowledge where, as in this case, there is neither fraud nor concealment, I cannot agree that a shareholder in a company shall be at liberty, at the end of twelve years, to question an important transaction, and to assert that he knows nothing of the transactions of the directors.

7 C B 63.

It is said that the absent shareholders in this case are not bound by the arrangement unless the Appellant can prove that every one of them knew the exact nature of the transaction. How can he prove this at the close of so many years? In *Brotherhood's Case* it was held that they had notice—not that, in point of fact, such notice was proved. The *Chippenham* arrangement it is too late now to quarrel with. I am entitled to assume that every shareholder knew of that arrangement. That fixes him with knowledge that the concern had no money to go on with, and was burdened with £17,000 debt, and with knowledge also that the shareholders were divided into two classes, and that extreme remedies were proposed to save the company from absolute ruin. The law forced upon him the knowledge of the actions against *Spackman* and his class, and the result of them, and also with results of his endeavours to wind up the concern. He knew that *Spackman* had refused to accept the *Chippenham* arrangement; he, in my opinion, must, as a partner, be held to have known who, from time to time, were acknowledged to be new partners, and which of the old partners had quitted the concern, and were no longer considered to be partners. He knew how adversely *Spackman* had acted, and he knew that he had been allowed to withdraw from the company; he knew that the trade was being carried on, and that no calls were made upon him for several years. If he required to be informed of particulars of the transaction, he was, in my opinion, bound to inquire, and it is admitted that if he had inquired he would have had a truthful answer, and that is proved by the evidence. The balance sheets, shewing the large sums received for "cancelled shares," are clear evidence binding him

to the knowledge that the large sums received by the company were the prices paid for the cancelled shares. Here, then, if a *bonâ fide* purchaser had had such notice, and had not chosen to ask how the payments were regulated, it would have been deemed *crassa negligentia*, and he would have been fixed with notice of the particulars of the transaction. This applies with still more force in this case, where a partner has actual knowledge that shares are, to a great extent, being cancelled. Again, the auditor, in his report, of which the absent shareholders had actual notice, speaks generally of an arrangement between the directors and the retiring members. Here, again, clearly a *bonâ fide* purchaser would be held bound to inquire, and so be fixed with notice; and still more strongly the rule applies to this case. And farther, of course no shareholder pretends ignorance of the sixth dividend which he received; and every such shareholder must have known that if the arrangements with those who had withdrawn were impeachable, he was quietly receiving more than belonged to him, whilst he reserved the right to attack those whose dividends he was receiving. Was this honest? Does it not forbid relief in a Court of Equity? But still farther, the remaining shareholders assumed to be, as in fact they were, the company, and accordingly, of their own power, they assumed new and extensive lines of business, created loans, admitted new members with different rights, and placed the company, in fact, as a new company springing out of the old one; and they rendered it impossible that they could ever restore that company to which the retiring members belonged, and which, if any relief were given against them, they would naturally expect to find ready to receive them.

These acts, without any attempt to obtain the concurrence of retiring shareholders, are, in my opinion, undeniable proof that they acquiesced in past arrangements, and elected to consider themselves alone members of the company. They would, of course, have resisted any claim of the others to participate in the dividend, or to interfere with their new and important arrangements. Let it be kept in view that the retiring members could not have maintained a claim to re-enter the company as partners. We have already seen that the real contest is between the members of the company only—the two classes. Every one of the movements of

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the company, after the arrangements for cancelling shares, was, in my opinion, an acquiescence by all in the arrangements which left the remaining members the sole members of the company.

To me it seems perfectly clear that upon all the rules which guide our Courts of Equity it is much too late for the actual members of the late company at the time of the crash to impeach any of the transactions complained of. No such attempt was made by the company or by any of its members, and what they could not do their official manager cannot accomplish. When could any remaining member have impeached the transaction if he had desired to do so? An early period after the payment of the £4000 would not have been selected, for he who seeks equity must do equity, and, of course, the thousands paid by the retiring members must have been returned, and, instead of paying £10 a share, they must have paid the past calls in full. In fact, a winding-up would have been inevitable, the very thing they desired to avoid. No other period could have been selected which would not have interfered with their own arrangements.

If the Lord Chancellor's Order is to be supported upon new grounds, it cannot remain without qualification. This is a claim by members of the company. They, without reference to creditors, must yet do equity to *Spackman*. He must have credit for his £800 and interest, and they must be charged with their dividend, for example, and they cannot, in my opinion, throw upon him any contribution to their loan or the debts of their new establishment. It would, in fact, require much care to do simple justice between the parties, assuming the right to be established to charge *Spackman* in any respect as a shareholder. It is to be lamented that the claimants, having so long slept over their supposed rights, should have awakened only at the moment when they had ruined the concern.

LORD CHELMSFORD:—

My Lords, it is quite true, as my noble and learned friend who last addressed your Lordships has said, that at the time I prepared my judgment in this case I had not had the advantage of seeing what he had written on the subject. But I need not add that when I received it I read it with great care and attention, and

with that respect which is due to his high legal authority and judicial experience, and with a mind open to every conviction which it might receive from an opinion justly entitled to so much consideration. I confess that, although I examined with the most minute care and attention that opinion, it did not induce me to change the judgment which I had prepared to deliver after very mature and anxious consideration.

My Lords, although I had given judgment upon a former occasion upon a very small part of this case—namely, upon the question whether time was of the essence of the *Chippenham* arrangement—yet I hope that I am not so far wedded to any opinion which I may have previously delivered as that my mind would not be open to yield to any argument in opposition.

My Lords, with respect to that which I must call the supplemental part of my noble and learned friend's judgment, it has been directed principally to a critical examination of the opinion which has been delivered by my noble and learned friend who is now occupying the woolsack, and in anticipation of that which I am about to deliver to your Lordships, and it has consisted of arguments in opposition to those opinions. My Lords, I believe that upon every point to which my noble and learned friend has last addressed himself my judgment will be found to be applicable, and therefore I shall, without further preface, submit to your Lordships the consideration of that judgment which I have prepared.

The question upon this appeal is, whether the Appellant, at the time of the winding-up order of the 20th of April, 1861, ought to have been placed upon the list of contributories of the *Agriculturists' Cattle Assurance Company.*

The case of the Appellant is, that he ceased to be a shareholder of the company in the year 1849, and that, from that time until the winding-up order was made, his retirement from the company was acquiesced in by the whole body of the shareholders.

In order fully to understand the position of the Appellant it is necessary to advert to some of the transactions which took place in the company, and also to his own conduct in reference to them before the time when the arrangement was made under which he alleges that he ceased to belong to the company.

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The validity of what is called the *Chippenham* arrangement is not in question upon the present occasion, but the circumstances connected with it, and the part which the Appellant took in respect of it, are not immaterial in the consideration of his case.

In the month of November, 1848, the affairs of the company were not in a satisfactory state. Many of the shareholders were anxious that it should be wound up, and that its liabilities should be ascertained and discharged. The directors and others of the shareholders were desirous of carrying on the company, in the hopes of retrieving its position, and creating a profitable business. For the purpose of ascertaining which of the shareholders wished to continue in the company, and which to withdraw, and whether it was practicable and desirable to permit the latter class to retire from the company, a special general meeting was called for the 2nd of November, 1848.

At this meeting it was proposed that the shareholders who were desirous of retiring from the company should be permitted to do so upon their complying with certain conditions; and the meeting having been adjourned to the 13th of November, a circular was sent to all the shareholders, with a form to be signed by such as should wish to retire from the company upon the proposed terms, and with an intimation that in case they should not attend the meeting of the 13th of November, or return the form duly signed on or before that date, they would be held as declining to concur in the propositions submitted to the meeting.

The only part of the proposed terms necessary to be noticed is, "that a call of £3 per share should be made on the capital stock of the company, and that the company should be empowered to forfeit the shares of retiring shareholders on payment by them of proportions of the call, varying according to the number of their shares, and that 10*s.* only of the above call should be paid by shareholders remaining in the company."

Several of the shareholders acceded to this arrangement, some of them, like *Brotherhood*, who is regarded as the representative of this class, intimating their compliance with the terms on the day named in the circular, and others being allowed to come in afterwards from time to time; so that when the Appellant withdrew from the company, thirty-four shareholders, holding 4026 shares,

had been allowed to retire upon the footing of the *Chippenham* arrangement. Many of the shareholders took no notice of the circular, and were assumed to have elected to continue members of the company.

The Appellant attended the meeting of the 13th of November, and expressly refused to accede to the arrangement, and manifested his hostility to it by making it the foundation of an application to the Court of Chancery for winding up the company. Both Vice-Chancellor *Knight Bruce* and the Lord Chancellor (*Cottenham*) were of opinion that the *Chippenham* arrangement formed no ground for bringing the company under the operation of the *Winding-up Act*, and the Petition of the Appellant was dismissed with costs.

It was supposed in the argument for the Appellant, that the Lord Chancellor entertained an opinion favourable to the validity of the *Chippenham* arrangement; but the question was not before him, and any expressions which he may have used upon the subject cannot, therefore, be much insisted upon. Since his decision all the Judges who have been called upon to consider this arrangement have uniformly treated it as being *ultrà vires* of the directors.

It was argued for the Appellant, that when his Petition for winding up the company was dismissed, he had no means of impeaching the *Chippenham* arrangement but by a suit in Chancery, and that this was impracticable, as the case of each shareholder was distinct. But I can see nothing which would have prevented the Appellant from filing a bill to have the shareholders restored to the register from which they had been improperly removed, or to restrain the company from acting upon the *Chippenham* arrangement.

On the 3rd of August, 1848, the directors had made a call of £1 per share, payable on the 3rd of September, 1848, which the Appellant and others refused to pay on the ground of its being irregular. The company brought five actions for this call against the Appellant and the others, but after the *Chippenham* arrangement the actions were discontinued, and the costs of the Defendants were paid.

On the 24th of November, 1848, the directors made a call of £4 per share, payable on the 23rd of December. On the following

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day a circular letter was sent to the shareholders to prevent their being alarmed at such an amount being called for, and explaining that the call, to the extent of £3 out of the £4, was made in furtherance of the proposition which led to the *Chippenham* arrangement, and the remaining £1 per share in consequence of doubts whether there was not some technical irregularity in the notice of the call made on the 3rd of August. The shareholders were therefore informed, that those who elected to remain in the company, and had paid the August call, would be required to pay 10*s.* per share only, and those who had not paid that call, £1 10*s.* only on account of the other call of £4.

The call of £4 not having been made in regular course, and for the ordinary purposes of the company, but in order to carry out the *Chippenham* arrangement, to which the Appellant was strongly opposed (his Petition for winding up the company on the ground of its having been entered into being then actually pending), it is quite clear that he could not be bound to pay this £4 call, or any part of it.

Nevertheless, in the month of January, 1849, the company commenced actions for the call of £4 against the Appellant and the other Defendants in the former actions.

The particulars of demand in the action against the Appellant, stated, that the action was brought to recover the sum of £2800, the amount of the instalment of capital, or call, which fell due on the 23rd of December, 1848, with interest, but that the Plaintiffs were willing to take £1050 with interest. The £2800 was the amount of the £4 call upon the Appellant's 700 shares, and the £1050 would have been £1 10*s.* upon these shares, being £1 for the August call, and 10*s.* the amount to be paid by a continuing shareholder under the *Chippenham* arrangement.

The Appellant pleaded several pleas, most of which were either for the purpose of compelling the company to formal proofs, or to enable the Defendant to raise technical objections; and there was one general plea of fraud to the whole action.

After the dismissal of the Appellant's Petition by Lord *Cottenham*, negotiations were entered into for the retirement from the company of the Appellant and six other shareholders against whom actions had been brought, and for settling those actions. By

a minute of the board of directors of the 29th of May, 1849, the company's solicitor was instructed to arrange terms with the shareholders' solicitors for the forfeiture of the shares standing in the names of their respective clients. It was ultimately agreed that the company should accept a sum of £4000, and that the parties should be released from all further liability, and their shares forfeited, and that a Judge's Order should be obtained on each action to stay proceedings on payment of the above sum in three instalments. The mode in which the arrangement was carried out was, that on the 6th of June, 1849, a resolution was passed by the directors declaring the shares of the Appellant and the others to be forfeited, by reason of their neglect and refusal to pay the instalment or subscription of £4 per share which had been called for under the provisions contained in the company's deed of settlement, and ordering that summonses should be taken out to stay proceedings in the actions upon the payment of the £1000 by the Defendants, in certain proportions; the Appellant's share of that sum being £800. On the same day, the 6th of June, a Judge's Order was made to stay farther proceedings in the action against the Appellant, upon payment of the £800 in discharge of debt and costs, by three instalments. On the 8th of June an entry was made in the register of the forfeiture of the Appellant's shares.

From this time the Appellant was considered to have ceased to be a member of the company. No notices of meetings were sent to him, no calls were made upon him, and, although a dividend of £6 per cent. upon the paid-up capital of the company was declared on the 11th of April, 1857, and paid to all the continuing shareholders, no dividend was paid upon any of the shares which had been held by the Appellant, or by those shareholders who retired under the arrangement with him and them. Subsequently to the Appellant's retirement, resolutions were passed at meetings of the company altering very materially the provisions of the deed of settlement as to the amount of the shares and the liabilities of the shareholders, and also considerably changing and enlarging the character and extent of the business of the company.

Thus matters stood with respect to the Appellant during the twelve years which elapsed between the arrangement under which his shares were forfeited and the winding-up order of the 20th of

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April, 1861. The Master of the Rolls removed the Appellant from the list of contributories, upon which he had been placed by the official manager, but Lord Chancellor *Westbury*, upon appeal, reversed the order of the Master of the Rolls, and ordered the Appellant's name to be included in the list. Your Lordships are now called upon to determine which of these opposite views of the Appellant's position in relation to the company is correct.

I do not agree with the Lord Chancellor, that the transaction with the Appellant and the other shareholders can be properly characterized as having been the result of fraudulent collusion between them and the directors; or that the entry of it in the minute book of the directors was a fraudulent concealment of the truth. I see no reason to doubt that the dealings of the directors with the shareholders who were desirous of retiring from the company proceeded upon a *bonâ fide* belief that the arrangement for the purpose was within their competency, and that there was no intention to disguise the transaction by omitting to mention in the entry on their minutes that the forfeiture of the shares was the result of an agreement with the retiring shareholders.

But I am clearly of opinion that (what I may call for distinction) the *Spackman* arrangement was not within the powers of the directors. The Appellant relies in support of it on the 125th and the 198th clauses of the deed of settlement of the company; by the former of which the directors are empowered, upon the neglect or refusal of any holder of shares to pay any instalment which may be called for under the provisions of the deed within two months after the day fixed for payment thereof, to declare that the shares in respect of which there shall be such neglect or refusal be thenceforth forfeited. And by the 198th clause the directors are empowered to bring actions, suits, and other proceedings, and at any time afterwards to stay, compromise, or compound any such action, suit, or other proceeding.

It does not appear to me that the transaction can be justified under the 125th clause. The only forfeiture of shares which can be declared under this clause is upon the neglect or refusal to pay instalments which may be called for under the provisions of the deed. But the £4 call, for the non-payment of which the Appellant's shares were declared to be forfeited, was not a call made

under the provisions of the deed, but for the purpose of carrying out the *Chippenham* arrangement (itself beyond the powers of the directors); and I have no hesitation in saying that a declaration of forfeiture of the shares of any shareholder for refusing to pay that call would have been an illegal act.

But greater reliance was placed by the Appellant upon the power given to the directors to compromise or compound actions by the 198th clause of the deed. It was said that actions having been brought against the Appellant and the others for non-payment of the £4 call, and the Defendants having pleaded to these actions, the arrangement for the forfeiture of the shares upon the agreement to pay £4000, and the stay of proceedings in the actions upon payment of that sum in different proportions amongst the shareholders, was a real staying, compromising, or compounding the actions under the deed, and was binding upon all the shareholders of the company.

But it appears to me that the transaction with the Appellant and other shareholders was not a compromise of the actions, nor did it even assume that shape. It was from the beginning to the end an arrangement to enable the Appellant and the others to withdraw from the company, and to purchase that withdrawal by the payment of a sum of money amongst them. Perhaps there cannot be a stronger proof of this than the order entered in the minute book of the directors under date of the 29th of May, 1849 (which I have already mentioned), that the company's solicitor be instructed to arrange terms with the solicitors of the shareholders "for the forfeiture of the shares standing in the names of their respective clients." This order was made after the negotiations and discussion of the terms upon which the shareholders should be allowed to retire from the company had resulted in an agreement to accept the sum of £4000, which the Appellant and the others agreed to pay "solely on the condition of their being properly released from all further liability, and their shares forfeited." This agreement was carried out by the resolution of the 6th of June, 1849, whereby the forfeiture of the shares was declared, and by the Judge's order of the same date staying the actions on payment by instalments of the agreed sum by the several Defendants in certain proportions. It seems to me impossible fairly to represent this

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transaction as a compromise of the actions, although the staying the proceedings on payment of the sum agreed to be paid for the retirement of the shareholders by the forfeiture of their shares was a necessary supplement to their performance of the terms of the agreement.

But supposing that the transaction could be regarded as a compromise of the actions, unless the directors were at liberty at any time to allow shareholders to retire from the company, and relieve themselves from all liability by payment of an agreed sum of money, I could not see how they could be justified in doing so, by making the forfeiture of their shares the consideration for staying actions which they had brought for calls against the shareholders.

The 198th clause of the deed must be taken only to confer upon the directors the power to compromise actions upon terms within their competency, and not to give them a discretion in dealing with actions to enforce existing liabilities of the shareholders, to discharge them from all future liabilities by allowing them to withdraw from the company.

I am satisfied that the *Spackman* arrangement cannot be regarded as a compromise of the actions which were pending, but that it was, to all intents and purposes, a purchase by the shareholders of the liberty of withdrawing from the company. And even if it can be fairly viewed as a compromise, it was one into which it was not competent for the directors to enter.

This arrangement, unlike the *Chippenham* arrangement, was not made known to the shareholders. It has been said that it was only carrying on the *Chippenham* arrangement, and allowing the Appellant and the other shareholders to come in under it, and, therefore, if the shareholders must be taken to have acquiesced in the *Chippenham* arrangement, the want of notice of the arrangement with the Appellant and others was immaterial.

But this appears to me not to be a correct view of the case. Putting aside the consideration of whether the accession to the *Chippenham* arrangement was to be notified within a limited time, it must be borne in mind that the Appellant positively refused to accede to it. It is true that the action against him was founded upon the non-payment of a call which was made for the purpose of carrying out the *Chippenham* arrangement. But the Appellant

never came in to that arrangement, but was allowed to retire from the company upon entirely different terms, and therefore the notice which the shareholders may have had of the *Chippenham* arrangement could never communicate to them any knowledge of the agreement by which the Appellant and the other shareholders are said to have ceased to be members of the company.

The forfeiture of the shares under the *Spackman* arrangement being beyond the powers of the directors, the transaction could only be made good by the consent of all the shareholders at the time, or by their ratification of it afterwards. Express consent is out of the question, but it is contended that sufficient information of the arrangement was given to the shareholders to bind them by acquiescence, especially after the lapse of twelve years, and that the various subsequent proceedings of the company after the retirement of the Appellant and the others, and particularly the alteration of the deed of settlement, and the payment of a dividend to the remaining shareholders, prevented them from impeaching the validity of the arrangement.

It is necessary to consider the question of acquiescence apart from that of time. The *Spackman* arrangement being *ultrà vires* of the directors could only be subsequently made good by the acquiescence of all the shareholders with knowledge of the transaction. But mere time alone, without such knowledge, could never, in my opinion, grow into proof of acquiescence, or render valid that which, without the consent of all the shareholders, was absolutely void *ab initio*. I mention this, because it appears to me that both in *Brotherhood's Case* (1) and the present case my noble and learned friend, the Master of the Rolls, relied very much in his judgment upon the length of time during which the different arrangements with the retiring shareholders had been acted upon. In *Morgan's Case* (2), in which, like the present, the question arose upon the directors having allowed a shareholder to withdraw from a company in a manner not authorized by their deed of settlement, the winding-up order was made nearly five years after the transaction, which had never been impeached. Lord *Cottenham*, although he considered the case a very hard one, yet, as he saw nothing in the way of acquiescence "to bind each and every member of the

(1) 31 Beav. 365. (2) 1 Mac. & G. 225.

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company," held that *Morgan* was properly placed on the list of contributories.

Notwithstanding, therefore, the long interval of time between the arrangement with the Appellant and the winding-up order, the question to be determined is, whether at the date of such order the Appellant had ceased to be a member of the company by reason of the acquiescence in that arrangement by the continuing shareholders.

It is quite clear that to render valid an act of the directors of a company which is *ultrà vires*, the acquiescence of the shareholders must be of the same extent as the consent which would have given validity from the first, viz., the acquiescence of each and every member of the company. Of course this acquiescence cannot be presumed unless knowledge of the transaction can be brought home to every one of the remaining shareholders. But it was argued that if the shareholders had the means of knowledge it would be sufficient to bind them, and Lord Justice *Turner's* opinion in *Nicol's Case* (1), was cited to this effect. But even if that opinion was correct as applicable to the particular case of a shareholder complaining that he had been induced to purchase shares by the fraudulent representations of the directors of a company, it can hardly be said that acquiescence by a dispersed body of shareholders in the illegal acts of directors can be presumed, because they might have discovered that the acts were in excess of the powers conferred by the deed of settlement. I cannot think that in such a case it is sufficient to shew that the shareholders, by the examination of the books of the company, might have made themselves acquainted with the unauthorized acts of the directors; for such an examination would, in most cases, be to many of them impracticable or useless; but knowledge of these acts ought to be brought home to them, either expressly or by necessary implication, before any presumption of acquiescence in them can be fairly raised.

But assuming that means of knowledge would be as effectual as actual knowledge to establish acquiescence, let us examine what were the supposed means of knowledge within the reach of the shareholders in this case. Considerable discussion took place at

(1) 3 De G. & J. 441.

the Bar as to the books to which the shareholders had the right of access, and particularly whether the minute book of the directors was open to their inspection. I do not think it necessary to enter minutely into this question. Perhaps upon a critical examination of the statute of the 7 & 8 Vict. c. 110, and of the clauses of the deed of settlement referred to upon the point, it would be found that the minute book of the directors is not one of those which, under the 33rd clause of the deed, is open to "the inspection and transcription" of the shareholders. But I prefer to assume that all the books, without exception, were within reach of the shareholders, and might have been examined by them. What they would have learnt from the books appears from an affidavit of the official manager, who says: "None of the books and papers in the company's office at the time of the winding-up order gave me any information as to the terms of the arrangement under which *Joseph* and *George Spackman* and the six other persons retired, and although I was informed that, in fact, they retired in pursuance of an arrangement made with the directors, and I was advised to place their names upon the list of contributories made out by me in this matter, I was unable to discover the terms of such arrangement until I obtained from Mr. *Kane*, in 1863, access to the papers of the late Mr. *Westmacott*."

After this it is impossible for the Appellant to rely upon the balance sheet of 1849 as notice to the shareholders of the *Spackman* arrangement. All that this balance sheet conveyed to their minds was, that a large amount of shares had been cancelled, but under what circumstances it afforded no information. As, however, the directors had, under the deed, a power of declaring the forfeiture of shares for non-payment of calls, the entry of "Cancelled Shares" would not suggest to the shareholders the necessity of farther inquiry.

It was said, that although the shareholders might have been kept in ignorance of the arrangement with the Appellant and others, yet that it must have been known to the auditors of the company, and that their knowledge must be imputed to the shareholders. In support of this proposition the opinion of Lord Justice *Turner* in *Nicol's Case* was again referred to, where he said: "There were auditors of this company appointed by the shareholders.

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These auditors were, within the scope of their duty, at least as much the agents of the shareholders as the directors were, and the false and fraudulent representations were discoverable by them." But with great respect for every opinion entertained by the late learned Lord Justice, I cannot help expressing a doubt whether he was correct in treating the auditors in that case as the agents of the shareholders, or in holding that in the exercise of their duty they would necessarily have discovered the fraudulent representations of the directors. Under the deed of settlement in this case the two auditors (after the first two) are to be appointed by the shareholders at an annual general meeting. It seems to me that it would be an unreasonable conclusion, from this mode of appointment of these officers, that they were thereby constituted agents so as to conclude the shareholders by their knowledge of any unauthorized acts of the directors. It would be no part of their office to inquire into the validity of any transaction appearing in the accounts of the company. Under the 107th clause of the deed of settlement the duty prescribed for the auditors is "to inspect, examine, and check the receipts, payments, vouchers, and accounts of the company."

The report of the auditors of the 12th of October, 1849, addressed to the directors and shareholders of the company (which by a note n the margin is said not to be entered in the minute book, but to be found in the papers of the company) was not within the duties of their office. But if it were, it certainly gave no information of the nature of the *Spackman* arrangement, though it is supposed to have done so in the following passage: "Many of the shareholders resisted payment" (of outstanding calls), "but after much and expensive litigation they found it their interest to make arrangements with the directors, which if entered into a year before would have essentially saved delay and expense. They did at last what they might have done at first."

It appears to me that there was no knowledge of the *Spackman* arrangement, nor any means of knowledge (even if the shareholders were bound to avail themselves of it), and consequently no actnal acquiescence in it by the shareholders, and that acquiescence cannot be inferred from the length of time during which the arrangement remained unimpeached.

But it is contended on behalf of the Appellant that he cannot be placed upon the list of contributories because, as far as respects his relation to the other shareholders since his retirement from the company, alterations have been made in the deed of settlement by which "the objects and business" of the company have been considerably extended, and there has been a dividend paid to the shareholders in which the Appellant did not participate. With respect to the creditors, it is admitted that all the debts due from the company at the time of the winding-up were incurred after the arrangement with the Appellant.

The Master of the Rolls in his judgment in this case appears to make the alteration of the deed of settlement a proof that the Appellant and others had ceased to be members of the company. His Lordship said: "Since these gentlemen left the company you have altered the whole of the system of laws, you have altered the deed of settlement, you have made a complete series of rules, every one of these gentlemen ought to have been summoned if they were to be bound by these rules. How were the acts done under this legal, if the shareholders had not been duly summoned?"

But, with great submission, is not this making the belief of the directors that the Appellant and the others had ceased to be members of the company a proof that they had ceased to be members of the company? No notices nor summonses were sent to the Appellant and the other retiring shareholders, because it was supposed that their shares had been regularly forfeited. What effect the want of notice to them might have upon the validity of the alterations in the deed of settlement it is unnecessary to inquire. But if this objection were urged by themselves it might fairly be answered: "You must be taken to have known that the arrangement by which you were allowed to retire from the company was not within the competency of the directors, and that there was in the deed of settlement a power given to the shareholders, at a special general meeting, to extend the business of the company; you voluntarily placed yourself in a situation in which you could not expect to receive any more notices as a shareholder, and you can hardly complain of alterations in the deed, which would otherwise be binding upon you, because you had no previous

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notice of the meeting at which they were proposed to be and were made."

There appears to me to be nothing in favour of the Appellant's case to be derived from the circumstance of the dividend which was paid to the shareholders after the Appellant's retirement, and which he would be entitled to if he continued a member of the company. There will be no difficulty in adjusting the claims of the different contributories *inter se* under the winding-up order.

The only question to be determined upon this appeal is, whether the Appellant at the date of the winding-up order had ceased to be a member of the company. If he had not, it is quite immaterial that the debts to which he is to be made contributory were incurred after the time when he supposed that his connection with the company had been brought to an end. The debts which are to be liquidated under a winding-up order are the debts of the company, to which every shareholder must be contributory.

The only inquiry which the official manager has to make in settling the list of contributories is, who are the existing shareholders of the company. And every one who has at any time become a shareholder, and is unable to shew that at the date of the order he had ceased to belong to the company, either by the forfeiture or transfer of his shares, or in some other authorized manner, must be placed upon the list.

There may be equities between the shareholders *inter se*, which may be adjusted in the course of working out the order; but with these the official manager and the creditors have nothing to do. The former must ascertain who are the existing shareholders of the company, and the latter must bring in their claims against the company; and those claims must be satisfied by the contributions of all who are shareholders of the company at the date of the winding-up order.

The Appellant's case is a hard one, as he might very well believe, especially after such a lapse of time, that he was entirely separated from the company by the arrangement for the forfeiture of his shares.

But the transaction was originally void, it was not made good by the consent or acquiescence of the shareholders, nor could the

length of time during which it remained undisturbed operate to give it validity. The Appellant, therefore, continued to be a shareholder at the time of the winding-up order, and was properly placed on the list of contributories.

I agree with my noble and learned friend occupying the woolsack that the appeal ought to be dismissed, and also that, in consequence of the great difference of opinion that has occurred in the case, nothing ought to be said about costs.

LORD ROMILLY :—

My Lords, this is an appeal from an Order of the Lord Chancellor, directing the name of Mr. *Spackman* to be restored to the register of shareholders.

The arrangement under which his name was taken from the list of shareholders took place in June, 1849. The order to wind up the company was in April, 1861; and the application to put him on the list of shareholders was made first in the month of March, 1864.

The first question to be considered in this case is, whether the transaction is tainted by fraud. If it be, it is quite clear that no time can cure it, and that whenever the fraud is discovered the persons who suffer by that fraud can apply to the Courts of this country to give them redress, and to restore the name to the register. I have very carefully considered this case with that view, and gone through every step of the transaction between the directors of the *Agriculturists' Cattle Assurance Company* and Mr. *Spackman* and the persons who acted with him. In doing so, it is necessary to define what that fraud is which taints a transaction, and renders it incapable of being cured by time. Fraud, I apprehend, means where a person endeavours to gain a personal advantage to himself, either by concealment of the truth, or by inducing another to believe that to be true which is not so. This may be done by one person, or by two or more persons who may concert together to do something which may be injurious to another person or to a class of other persons. This, if wilfully concealed from them, constitutes fraud; but it is essential to the commission of fraud that the person who commits it should obtain, or believe that he obtains, a personal advantage to himself, and that he

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deceives or misleads the person injured by the transaction, either by false representation or by intentional concealment.

As I believe the doctrines of Equity to be founded on the highest principles of morality, truth, and justice, so I hold it to be a paramount duty that Courts of Equity should not confound culpable acts with those which, though irregular, are done honestly and *bonâ fide*. To do so is to confound the distinction between right and wrong. It is, therefore, with some dissatisfaction that I hear the occasional use of such expressions as a constructive fraud, or a fraud which is only one in contemplation of a Court of Equity, and the like. The landmarks of morality, which it is the peculiar duty of Courts of Equity to maintain, would be obliterated if that which is not morally culpable were termed fraud, and if it were visited with the penalties which are properly attached to dishonest conduct.

The first question, therefore, in this case is, did Mr. *Spackman* and those who acted with him, on the one hand, and the directors of the company, on the other hand, act *bonâ fide* and openly in this transaction? I think it impossible to say that they did not. They were at arms' length, acting hostilely towards each other; *Spackman* and his associates resisting the *Chippenham* arrangement, endeavouring to wind up the company, and to bring all the matters to a conclusion; the directors, on the other hand, doing all they could to benefit and maintain the company. In this state of things the compromise in question is entered into. I assume, without expressing any opinion, that the compromise was not warranted by the deed of settlement of the company. But unquestionably the powers contained in clause 164 are very large, and especially when combined with clause 198; and the directors might well believe, and I think did conscientiously believe, that they had the power to make this compromise. Mr. *Spackman* and those who acted with him could not come into the *Chippenham* arrangement, for they had always insisted that it was illegal and invalid. They were determined to have nothing more to do with the company, if they could possibly escape from it. They defended all actions, and resisted all calls. They were doing this openly, employing their own solicitors, who were acting against the solicitors of the company. If this state of things continued, it

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was obvious that the company must come to an end. The directors thought it might be profitably continued if these ruinous proceedings could be stayed. In this state of things a compromise is suggested; the terms of it are openly discussed, the offers made are considered in the most open manner, they are rejected, and new offers made, not a word said about concealment on either side, not the suspicion of a pecuniary advantage to any one, and an offer is finally made and accepted, that *Spackman* and his associates should give a sum of £4000, and be permitted to retire from the company. This is accepted. The mode of retirement is immaterial; the directors did it by making a nominal call, and forfeiting the share for non-payment of it. I must confess it does appear to me to be as *bonâ fide* and open a transaction as ever was entered into, and one where both parties sincerely and *bonâ fide* believed that they were acting within the scope of the deed of settlement, the partnership articles by which they were bound.

I agree entirely with the reasoning of the judgment of Lord *Westbury* (1). The consequences he points out necessarily follow if any badge of fraud could be discovered in this transaction. But it is very material to be observed, that his Lordship founds his judgment solely and exclusively on the dishonesty of the transaction between Mr. *Spackman* and the directors, and approves of *Brotherhood's Case* (2), because there was no dishonesty in it. Therefore, in the opinion of the Lord Chancellor, and also of the Lords Justices, the questions in this case turn upon whether the arrangements were fraudulent—that is, dishonest—or not.

It is one of the misfortunes of this mode of proceeding by summons, that as there are no pleadings, so the case relied on by the complaining party is difficult to be ascertained, and the ordinary rules of Equity cannot be observed. If a bill were filed, the facts constituting the fraud relied upon must be distinctly alleged and clearly proved, or the case fails; but in a summons everything is at large, and in this case, upon the affidavits of the official liquidator, there does not appear to be any allegation of fraud of any description, except that the transaction was concealed from the shareholders. But in what does the concealment consist? It consists simply in this, that the transaction was not proclaimed

(1) 34 L. J. (Ch.) 321. 11 Jur. N.S. 207 (2) 31 Beav. 365. 8 Jur. N.S. 926

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openly at a public meeting, or by a circular; for, in my opinion, the whole transaction might easily have been discovered by an examination of the books, and the subsequent correspondence discovered by the official liquidator only confirms the *bona fides* of the transaction. The books were open to the inspection of the shareholders, and the auditors who reported on the matter must have known the whole transaction, and, indeed, they refer to it in their circular which was sent to the shareholders before the public meeting.

But the remarkable thing in this case is, that if the concealment be proved, it amounts to nothing. It is not the concealment of Mr. *Spackman*, or those who acted with him. Concealment to constitute fraud must not only be wilful, but it must also be concealment by the person who is sought to be made answerable for the consequences of such concealment; whereas in this case *Spackman* and his associates, who are sought to be made answerable, concealed nothing. They had ceased to be members of the company. They had no power over the books; they had no power of sending circulars, if such were necessary, to the various members of the association. They had every reason to believe that the directors would do all that was proper to be done, and they were justified in relying on that belief.

But was there any concealment? In fact, did not every person who was a shareholder in the company either know it, or had he not the means of knowledge, and was he not put on inquiry?

Mr. Baron *Parke*, in the case of *May* v. *Chapman* (1), says, that "Notice is actual knowledge, or the means of knowledge, to which parties wilfully shut their eyes." Try this case by that test. Take, for instance, the evidence of a witness, Mr. *Pateman*, who says that he was wholly ignorant of the transaction. He attended the meeting of November, 1848; he seconded *Spackman's* motion of adjournment; he knew of the *Chippenham* arrangement; he knew of the proceedings in Chancery; he never speaks openly on the subject, but in private disapproves of the arrangement. He must have known that *Spackman*, who had taken so active a part against the *Chippenham* arrangement, was no longer a member of the company, and he might have seen all the books, and ascertained exactly how the

(1) 16 M. & W. 355, 361.

matter stood. In a less degree this observation applies to several of the other witnesses. I think that the remaining shareholders must be held to have known that *Spackman* was no longer on the list of the shareholders.

In *Lane's Case* (1) the Lord Chancellor held that slight circumstances are sufficient to shew that the shareholders were cognizant of what it was the duty of the directors to bring before them. In this case it is obvious that the shareholders were divided into two great classes, one who wished to retire, and one who wished to remain. Both classes knew that a great remodelling of the company was about to take place, and that many of the shareholders dissented, and that these were got rid of either under the *Chippenham* arrangement or by compromise, which prevented the opposition which would have arisen from their continuing to be members of the company. Is it competent for these persons, after the lapse of twelve years, to say that the whole transaction must be set aside, when it is impossible to restore the parties to their original position?

It is obvious that both the Lords Justices, *Knight Bruce* and *Turner*, and my Lord *Westbury*, concurred in this, that unless for fraud inherent in the transaction itself, and fraud on the part of the person who dealt with the company, the transaction could not be set aside, and that time had barred all remedy in this respect. This is on a principle which it is of the greatest interest for society that Equity should maintain, and which has been carried out very strictly in those cases relating to joint stock companies, viz., that all persons who come to enforce their rights should do so speedily. It is the more necessary to do this in a case where it is impossible for the Court to put these parties in the same situation as they were in before the compromise. Mr. *Spackman* might have sold his shares to another holder for a nominal sum, or even given him money to take them, and this, if done *bonâ fide*, Equity sanctions. This is settled by *De Pass's Case*, and several other cases. If the company had prospered it is obvious *Spackman* could not have returned to the company. The company is entirely altered. He pays a large sum of money and gets no dividend; he has no means of preventing the mismanagement of a company to which he no

(1) 1 De G. J. & S. 504.

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longer belongs. Unless, therefore, the transaction was in itself *ipso facto* void, I think that it cannot be set aside after so long a lapse of time.

I admit that if the transaction was originally absolutely void, and not simply voidable, the necessary consequences follow, and Mr. *Spackman* has always been, and must now continue to be, a member of the company. But I think that to hold the striking the name of Mr. *Spackman* off the register by the directors, and the forfeiture of his shares, to be a transaction in itself *ipso facto* void, would be to overrule a long series of settled authorities.

In the first place, it seems to me to be admitted, that if all the members of the company had thought fit to assent to the transaction, it would have been good. This, to use the expression of Lord *Mansfield* in the great case of *Zouch* d. *Abbott* v. *Parsons* (1), proves it to be voidable only, for a void transaction is incapable of confirmation.

Then, again, the shareholders might have compelled *Spackman* to abide by the arrangement if the company had turned out profitable; if so, it follows that the transaction was voidable, and not void—I take it to be a cardinal rule, that whenever the validity of an irregular transaction depends on the confirmation of any one or more persons, that transaction is voidable only, and not void. Of course, if this company had bought mines or entered into a contract to set up a steam packet business, this would have been simply void, and would not have bound the company or any one, because they could do nothing that was beyond the objects of the company; but, on the other hand, the directors might do anything, however irregular, in promoting the objects of the company, provided it was done *bonâ fide;* and this could not be avoided unless steps were speedily taken for this purpose.

This is, as I believe, the distinction which is taken in all the cases on this subject. The short result of them may, I think, be stated to be, that the directors are the agents of the company, that the company are not bound by any acts done by them for objects which the company has no power to entertain, and that these are the only acts which, if the directors do, are *ipso facto* void. But that not only do the acts of the directors bind the company when

(1) 3 Burr. 1794, 1807.

done within the scope of their authority, but also that where the acts of the directors, however irregular, belong to a class of acts which class is authorized by the deed of settlement, in these cases the company is absolutely bound when the acts are done with strangers who act *bonâ fide* with the company, and when these acts are done with the shareholders of the company then that these acts are voidable only, and that the other shareholders must take active steps to set aside the transaction, and that when there is no dishonesty, time bars the remedy. Amongst these acts there is none that more clearly belongs to the class of acts authorized by the deed of settlement than the forfeiting of shares, and the striking off from the register, or adding on to it, the name of a shareholder. No Judge hitherto has treated the transaction as *ipso facto* void. The rule of a Court of Equity has, I believe, always been that where acts are not void in themselves, but simply voidable—if they are done *bonâ fide* time bars the remedy, and the time begins to run from the period when the act was done. If the act is tainted with fraud the time begins to run from the time when the fraud was first discovered by the person injured thereby. That is reasonable time,—what that is, may vary in different cases, but in all cases that I am aware of the Courts of Equity have held that such a period of time as twelve years has barred the right of any person to impeach the transaction, and this was obviously the opinion of the Lords Justices. I think, therefore, that the sole question in this case is a question of fact, and simply that on which Lord *Westbury* puts it, viz., was there fraud or not in the transaction? I see none, and I think that Mr. *Spackman* cannot himself be made liable, because the persons with whom he dealt omitted to do their duty in informing the shareholders of what they had arranged with him, or because the other shareholders thought fit not to inquire into the case.

I am, therefore, of opinion that Mr. *Spackman* ought not to be restored to the list of shareholders.

LORD COLONSAY:—

My Lords, in common with the rest of my noble and learned friends who have addressed the House, I have considered this case and the evidence upon which it rests with all the care and atten-

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tion I could command; and I have formed an opinion upon each of the points involved in it. My noble and learned friends have explained very fully the facts of the case, and given a history of the company, including that of the transaction now in question. I, therefore, do not intend to occupy the time of the House by repeating that history. I propose to confine myself to brief statements of what appear to me to be the main questions raised by the case, and the brief results of my opinion upon each of those questions.

The winding-up order was made in April, 1861. The question is, whether the Appellant is to be on the list of contributories. That depends on whether he had ceased to be a partner. He says he had ceased in 1849. He does not say that he had sold and transferred his shares. But he says that his shares were forfeited by the directors in respect of the non-payment of a call; and he refers to sect. 125 of the deed of settlement, which undoubtedly gives to the directors power to forfeit shares for non-payment of calls. If it appears that the shares were duly forfeited under the powers so given to the directors, that of itself must be held to have terminated the Appellant's character of shareholder from the date of such forfeiture.

This raises the question whether the forfeiture was made in the due and regular exercise of the powers given to the directors by sect. 125. I am of opinion that it was not. It was indeed in form a forfeiture for non-payment of a call, but of a call made not under the provisions of the deed, and with a view to its being paid as a call, but under an arrangement with a view to its not being paid in order that the non-payment might be made the nominal basis for forfeiture of the shares, and thereby enabling certain shareholders to withdraw from the company on certain terms.

It does not, however, necessarily follow that a transaction or arrangement of that kind, sanctioned or acquiesced in by the other shareholders, might not be effectual. That raises the question whether the arrangement under which the Appellant's shares were forfeited was so sanctioned or acquiesced in. I am of opinion that there are not sufficient grounds for holding that it was sanctioned or acquiesced in by the other shareholders.

I shall not repeat the history of what has been called the *Chip-*

penham arrangement. I assume that all the shareholders got notice of that proposal, and were aware that many had agreed to its terms and had gone out under it. But I think that the Appellant did not go out under that arrangement. He refused from the beginning to agree to it. He attempted by judicial proceedings unsuccessfully to get the company wound up. He resisted the call on grounds of alleged illegality. He kept the directors at bay for a length of time, and finally he, and five or six others who were associated with him, transacts on terms essentially different from those of the *Chippenham* arrangement. It does not appear that this transaction was submitted to the consideration of the shareholders, or that any notice of it was given to them, or any attempt made to do so, or that it came to their knowledge in any way. I think I am right in saying that there is no direct evidence to that effect. Direct evidence, however, is not necessary. But I do not think that there are sufficient circumstances to infer or presume knowledge on the part of the absent shareholder. There is some, though not much, direct evidence the other way. Without knowledge, actual or presumed, there could not be acquiescence. Lapse of time is a very important element in the question of acquiescence, but I am not disposed to accept it as a substitute for knowledge. I shall afterwards advert to the influence due to time as a separate and independent agent in reference to the facts of this case.

But there was a clause in the deed, sect. 198, whereby the directors had power to enter into compromises of actions, and the transaction with the Appellant and his associates involved the settlement of their litigation. That raises the question whether the arrangement for the forfeiture of the shares was a thing within the scope of the power to compromise conferred on the directors. I am of opinion that it was not. The litigations did not involve any question as to the Appellant being or not being a partner of the company, or being or not being entitled to be released from the position of a shareholder. The whole proceeding was a device to obtain an ostensible ground for forfeiture, and the real question was, how much money the Appellant and his associates were to pay.

Now, although I have called this a device, and although I think it was a proceeding not sanctioned by the constitution of the com-

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pany and *ultrà vires* of the directors, and as such illegal, I do not regard it as fraudulent on either side. I do not think that it is tainted by *mala fides*, or intentional concealment. But I think it was invalid, and did not legally put an end to the Appellant's character of shareholder, though he may have honestly thought that it did. If he has not legally ceased to be a shareholder I do not think that the changes made in the constitution and objects of the company will sustain him in his present contention.

But although the transaction of 1849 had not the effect of legally severing the Appellant from the company at that time, the question remains, and it is the question on which I have felt most difficulty in forming my opinion, whether the subsequent lapse of time does not operate as an effectual obstacle to the demand of the official liquidator. The transaction was not fraudulent on the part of the Appellant. The directors acted, as they believed, for the interests of the company. The Appellant ceased to be treated as a shareholder, and in the interval important changes were made in the constitution and objects of the company.

Two of my noble and learned friends think that notwithstanding the original illegality of the transaction, and the non-communication of it to the shareholders, and their continued excusable ignorance of it, the mere lapse of time operates a cure and makes the transaction effectual. With unfeigned respect for every opinion of my noble and learned friends, and having listened with great interest to the outpouring of a mind from which all of us have often derived instruction, I have not been able to arrive at that conclusion. I regret this, because I think the case a hard one for the Appellant. But, on the other hand, I think it is a principle of importance that absent shareholders should not be prejudiced by illegal transactions entered into not only without their knowledge, but without any step having been taken to inform them, or put them on their guard, or any reasonable means having been afforded them of becoming aware of what was going on, or what had been done, or even anything having been presented to their minds which ought to have put them on their inquiry. For these reasons, and those which have been more fully stated by two of my noble and learned friends, I think that the order appealed from should be affirmed.

Mr. *Amphlett*:—Your Lordships will allow the official manager to have his costs out of the fund.

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LORD CRANWORTH:—Yes.

It was Ordered and adjudged that the Order of the Court of Chancery, of the 11th of February, 1865, so far as complained of in the said appeal, be affirmed, and that the appeal be dismissed; and it is farther ordered, that the costs incurred by the said Respondents *Lewis Henry Evans*, the official manager of the *Agriculturists' Cattle Insurance Company*, and *Thomas Hughes*, Esq., Member of Parliament, the creditors' representative, in respect of the said appeal, be paid out of the assets of the said company.

Solicitors for the Appellant: *Whitakers & Woolbert.*
Solicitors for the Respondent *Evans*: *Horn & Murray.*
Solicitors for the Respondent *Hughes*: *Warry, Robins, & Burges.*

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June 25.

LEWIS H. EVANS, OFFICIAL MANAGER OF THE AGRICULTURISTS' CATTLE ASSURANCE COMPANY . . . . . } APPELLANT;

AND

AARON SMALLCOMBE, AND ANOTHER, EXECUTORS OF AARON SMALLCOMBE, SEN., DECEASED, AND THOMAS HUGHES, THE CREDITORS' REPRESENTATIVE . . . } RESPONDENTS.

Company—Arrangement—Notice—Costs.

An arrangement (*sic* the previous case) allowing members of a company to retire from the company under certain conditions therein agreed to by a public meeting of the shareholders, convened after due notice to all the shareholders, is not in itself valid, unless made in accordance with the provisions of the deed of settlement, and if not assented to directly or indirectly, after due notice, by all the shareholders, may be impeached by any one of them. But if the means of notice to all appear sufficient, so as to raise a clear presumption of knowledge and acquiescence, and the arrangement is left unimpeached by any one for a great many years, the shareholder who has been allowed to retire, and whose name has been removed from the lists of

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the company, will be held to be relieved from his liability as a shareholder. (*Diss.* Lord *Chelmsford*).

The *Chippenham* arrangement was, in this case, adopted and acted on, with this single exception, that the retiring shareholder did not at once pay the sum for which he was liable, but was allowed to give a bill for the amount, which bill was paid at maturity. The directors then passed a resolution declaring his shares cancelled, and his name was removed from the lists:—

Held (*diss.* Lord *Chelmsford*), that his name could not, after the lapse of years, be put on the list of contributories.

A shareholder who had been allowed to retire, upon terms not consistent with the provisions of the deed of settlement, nor those of the *Chippenham* arrangement, and was therefore held liable to have his name put upon the list of contributories, was not in a better situation than any of the ordinary acquiescing shareholders to complain of what had been done in this case.

The costs were ordered to come out of the general fund.

THIS was an appeal against an Order of the Master of the Rolls, made on the 21st of February, 1867, by which the names of the Respondents, as executors of *Aaron Smallcombe*, sen., deceased, were removed from the list of contributories to the *Agriculturists' Cattle Assurance Company* (1). The summary of the general facts of the case is given at the beginning of the report of *Spackman* v. *Evans* (2). The only special facts here to be added are, that Mr. *Smallcombe* became a shareholder in July, 1847, received a dividend and paid calls. He attended the meeting at *Chippenham* on the 13th of November, 1848, and agreed to the terms of the "*Chippenham* arrangement;" but instead of paying, on or before the 13th of December, 1848, the sum of £375 thereby declared due from him to the company, he asked for an extension of time; and by a resolution of the directors, made on the 11th of April, 1849, a bill accepted by him for the amount was taken by the directors, and being paid in August, 1849, the shares standing in his name were, by a resolution of the directors, passed on the 5th of September, 1849, ordered to "be cancelled in consequence of calls in arrear not being paid." Balance sheets were issued by the directors in 1848, 1849, and 1850, in all of which considerable sums were put down as received for "cancelled shares."

Mr. *Smallcombe* had never since then taken a part in the affairs of the company, or been in any way treated as a member of it. He died on the 6th of June, 1861. The winding-up order had been

(1) Law Rep. 3 Eq. 769. (2) *Ante*, p. 171.

obtained on the 20th of April, 1861. The executors, in August, 1861, inserted in the newspapers the usual advertisement, calling on creditors of the deceased to send in their claims, and his estate was duly administered by them. In December, 1866, they received notice of the intention of the official manager to apply to the Court of Chancery to put their names, as executors, on the list of contributories to the company. The executors resisted, and the Master of the Rolls, acting on *Brotherhood's Case* (1), refused the order. This appeal was then brought.

Mr. *Amphlett*, Q.C., Mr. *Druce*, Q.C., and Mr. *F. W. Bush*, appeared for the Appellants.

Sir *R. Palmer*, Q.C., Mr. *Pearson*, Q.C., and Mr. *Winterbotham*, were for the Respondents, the executors.

For the Appellant, it was contended that by becoming a shareholder *Smallcombe* had come under obligations to the other shareholders; that without their consent he could not be released except by matters in strict accordance with the provisions of the deed of settlement; that the *Chippenham* arrangement was not one which even a public meeting of the shareholders could validate; that even if it could be valid, it had not been complied with by *Smallcombe*; that the call of £4 per share was irregular, and that the non-payment of it did not confer on the directors the right to forfeit the shares of the non-paying shareholders; that the arrangement between *Smallcombe* and the directors was not one which the directors had power to make; that the forfeiture declared on the 5th of September, 1849, was not a *bonâ fide* forfeiture, but merely part of the machinery to carry into effect an unlawful arrangement; and that this arrangement had not been consented to by all the other shareholders so as to make it binding.

For the Respondents, the executors, it was contended, that the forfeiture was valid at Law, and could not be impeached in Equity; that the *Chippenham* arrangement had been duly assented to by all parties, the persons not present at the meeting being bound by the acts of those who were present—notice of the meeting and its object having been duly given to all the shareholders; that after

(1) 31 Beav. 365.

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acquiescence during so long a lapse of time the estate of *Smallcombe* could not be made liable; that the company had ceased to be the same as that to which he had belonged; that no debt now due from the company was a debt which had existed while he was a member of the company, and that his executors, after due notice to creditors, had fully administered his estate.

The following cases were cited: *Ness* v. *Armstrong* (1); *Bargate* v. *Shortridge* (2); *Brotherhood's Case* (3); *Clarke* v. *Dickson* (4); *Stewart's Case* (5). This first argument took place before Lord *Cranworth*, Lord *Chelmsford*, Lord *Romilly*, and Lord *Colonsay*. It was a second time argued, when the Lord *Chancellor*, Lord *Cranworth*, and Lord *Chelmsford* were present. In this second argument it was contended for the Appellant, that as Mr. *Spackman* had been, by the ultimate decision in his case, forced back into the company, he had a right to say that no agreement made under the *Chippenham* arrangement, to which he had never assented, but which he had formally and perseveringly resisted, could be binding on him; and that no lapse of time could be taken as against him as proof of acquiescence in what had been done with regard to Mr. *Smallcombe*. The *Chippenham* arrangement, invalid in itself, was therefore, it was contended, not made valid by acquiescence of all the shareholders.

At the close of this argument for the Appellant, the counsel for the Respondents not being called on

THE LORD CHANCELLOR (Lord *Cairns*) said:—

My Lords, all the facts which are involved in the present appeal have been so recently and so fully before your Lordships' notice, and they have, as I well know, been the subject of such anxious and continued consideration by your Lordships, that I think you will agree with me that it will be unnecessary, in the view which I think your Lordships take of this question, to call on the counsel for the Respondents in this appeal.

My Lords, although I had not the honour of being present at the time that Mr. *Spackman's* case was considered in your Lordships'

(1) 4 Ex. 21.
(2) 5 H. L. C. 297.
(3) 31 Beav. 365.
(4) El. Bl. & El. 148.
(5) Law Rep. 1 Ch. Ap. 511.

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House, yet I apprehend I am correct in stating that it was the opinion of the majority of your Lordships in that case, indeed I think it was the opinion of all of your Lordships who were present, that, looking to that arrangement, which has been called throughout in this case the *Chippenham* arrangement, it would have been competent for any shareholder in the company to object within a reasonable time to that arrangement, that the arrangement was one which was *ultrà vires* of the directors, and which, if supported at all, could only be supported by reason of the consent or acquiescence of all the shareholders in the company, or by the proof of such a state of facts as would lead to the reasonable inference that there had been that consent or that acquiescence.

My Lords, in the present case, if the objection which is now made by the official manager had been made by any shareholder in the company within a reasonable time after the name of Mr. *Smallcombe* was taken off the register of shareholders, I apprehend that that objection must have prevailed, and that Mr. *Smallcombe* must have continued a member of the company. But your Lordships have so recently had the facts of this case before you that I need not remind you, in the first place, of the lapse of time which occurred between the removal of the name of Mr. *Smallcombe* and the period when an objection under the winding-up was taken to that removal.

My Lords, in my opinion lapse of time alone certainly would not make valid that which at the beginning was invalid ; and if in this case the defence of Mr. *Smallcombe* were to rest merely upon the lapse of time, I apprehend that defence would fail. But your Lordships have to consider not merely the question of the lapse of time; you have to consider also what was the knowledge possessed by the company at large, that is to say, by the shareholders in the company at large, of the *Chippenham* arrangement, and what was the knowledge possessed by the company of what was being done under the *Chippenham* arrangement. Now, my Lords, I take the occurrences at the first of the meetings which took place, the meeting of the 2nd of November, 1848, convened by the circular of the 18th of October, the adjournment of that meeting of the 2nd of November, and the arrangement which led to that adjournment, the circular which was issued on the 4th of November, 1848, con-

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vening a second special meeting for the 13th of November, and the propositions contained in the circular; and when I take, farther, the renewed meeting on the 13th of November at *Chippenham*, and the agreement which is dated as of that date signed by Mr. *Smallcombe* and a number of other shareholders; and when I take farther the three different balance sheets issued in the years 1848, 1849, and 1850, I must say that, in my own mind, I cannot come to any conclusion but this:—that every shareholder in this company at this time must be taken to have been perfectly aware of the proposal which was made at *Chippenham* for the withdrawal of certain shareholders from the company; and also of the fact that that proposal had, by a number of shareholders, been accepted, and was to a large extent being acted upon.

My Lords, it appears to me that the documents to which I have referred—the circular letters—upon the face of them are perfectly unambiguous on this subject. That they were circulated and sent to every shareholder in the usual way I think must be taken to be clear upon the evidence of the Appellant himself. That the balance sheets which afterwards were issued, and which spoke of funds received for "cancelled shares" to a very large amount, could ever have conveyed to the minds of the various shareholders who saw them the idea that those shares were cancelled merely in consequence of insolvency on the part of the shareholders and in pursuance of the provision in the deed, appears to me to be a suggestion which is altogether inadmissible. I think it must be taken that the shareholders had communicated to them the *Chippenham* arrangement in its details, and the fact that that arrangement was being largely acted upon.

Now, my Lords, if that be so, your Lordships have the case of the directors of a company openly and fairly, without any concealment, or any implication of it, stating to their constituent body that they are about to act upon a certain footing with regard to the release of shareholders from the company, and with regard to what is, perhaps, of still more importance, namely, the acquisition of moneys to come into the coffers of the company upon the footing and in consequence of the retirement of those shareholders. You have that communicated to the various shareholders in the company, and you have in this particular case that which I think

extremely satisfactory, namely, a number of shareholders coming forward, whom I take to be the best witnesses that could be produced in the case, and who do not offer any denial to the fact of that communication having been made to them, but who can only go so far as to say that they received circulars which they perfectly understood, and which they do not affect to deny; but they say that they took no notice of them, but put them in the fire, or made no answer to them—leaving unaffected the fact that the communication was made to them in the way I have stated. Therefore your Lordships have the facts communicated: you have the course of dealing which the directors announced to the shareholders that they intended to pursue immediately entered upon, and largely acted upon; you have those changes made in the constitution of the company which have been so often referred to in the argument; and you have then, after the lapse of a great number of years, and after the winding up of the company, an attempt made by the official manager to bring back upon the list of shareholders of the company those who went out strictly and avowedly upon the footing of this arrangement being approved of in the way I have mentioned. My Lords, I apprehend that it would be in the highest degree contrary to the principles of Equity to allow any persons having that knowledge, which I hold must be imputed to them in this case, and having taken no steps to prevent that course of action continuing which they knew was going on, to come forward after such a lapse of time as has occurred here, and to upset and disturb the course of dealing which has taken place, and upon which so large a sum of money was paid, and arrangements so extensive were carried into effect.

My Lords, it is said that there is in the present case at least one shareholder who does not come within the range of the remarks which I have made to your Lordships. It is said that Mr. *Spackman*, at all events, is not to be considered as acquiescing in this arrangement, because up to the time when he left the company he was protesting against it, and to some extent, in the Petition which he presented to the Court of Chancery for the winding up of the company, he was complaining openly in a Court of Justice upon the subject of the arrangement. Now, I own that I cannot see that Mr. *Spackman's* case is in any degree more favour-

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able than the case of any other shareholder in the company for the purpose of disputing the arrangement made with Mr. *Smallcombe.* The position of Mr. *Spackman* was this:—He was as free as any other shareholder, up to the time of his assumed retirement from the company, to complain of the existing arrangements, and to prevent Mr. *Smallcombe,* or any other shareholder, from being released from the company; but, in place of doing that, he thought it more beneficial to himself to make a separate bargain for himself, which your Lordships have held cannot be maintained, in consideration of which he agreed not to take any farther interest in, or to meddle any farther with, the affairs of the company, but to become a retiring shareholder. If that had been a valid agreement, he would have been entirely out of the company as a shareholder; but your Lordships have held—and, in the application of strict principles which must be applied to such a case, you were obliged to hold—that that was an invalid agreement. But I think it is wholly impossible for Mr. *Spackman* to say that, in this case, the lapse of time that occurred between the making of the arrangement and the winding up of the company is to be wholly obliterated, and that he is to be allowed to come forward now to complain of the arrangement that was made by Mr. *Smallcombe.*

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My Lords, I only desire to add one word with regard to a phrase which I think, in matters of this kind, is sometimes somewhat misapplied, namely, the phrase "acquiescence." If by "acquiescence" is meant a course of conduct which amounts to active and intelligent consent, I think it very likely that many of those shareholders could not be held to have actively or intelligently consented to what was going on. But what I think is the real question to be looked at in any case of this kind is this:—Had the shareholders notice of the way in which the affairs of the company were being conducted, and its property was being managed, and of the rights and interests which were being created with regard to the stock of the company? If they had that notice, and if they were content not to oppose those acts which they knew were every day being done, then I think they are debarred in point of equity from coming forward at a later period for the purpose of undoing the rights and releases which had been created and given, although it might well be that any remedy to which they would originally

have been entitled against the executive of the company, for any breach of duty on their part, might be unaffected even by lapse of time. But with that your Lordships have nothing to do in these proceedings; you have simply to say whether those who, by virtue of the *Chippenham* arrangement, had their names taken off the list of shareholders are now, after all that has occurred, and at this distance of time, to be placed on that list. My Lords, with regard to the payment made by Mr. *Smallcombe* in this case, it appears that it was not made at the time that was mentioned for payment in the agreement entered into at *Chippenham*. But, as I think was stated in the course of the argument by one of your Lordships, the real point to be considered is not whether the payment was made on the day, but whether Mr. *Smallcombe* assented to become bound by the *Chippenham* arrangement. Now, from the evidence of the official manager himself, it appears to me perfectly clear that he did assent to it at the time; and the enlargement of the time of payment cannot, I think, in any way affect his position.

I think, therefore, my Lords, that the official manager cannot succeed in this appeal in having the name of Mr. *Smallcombe* placed upon the list of shareholders, and I submit to your Lordships that the proper Order to be made in this case will be to dismiss this appeal. Upon the subject of costs I do not know what view will be taken by your Lordships, but I venture to suggest that the same course which was taken in *Spackman's Case* should be taken in this, because it seemed to be absolutely necessary that all these appeals should be brought up together to your Lordships' House.

LORD CRANWORTH:—

My Lords, I have very little to add to what has fallen from my noble and learned friend. In *Spackman's Case* I felt compelled to come to the conclusion that neither the great lapse of time between the cancellation of his shares and the winding-up order, nor the material alterations made in the constitution of the company during that period, entitled him to say that he was not to be treated as a contributory; and I came to that conclusion because I could not discover that the absent shareholders ever had any notice that he had been released on terms different from those of which they had

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notice by the circular of the 2nd of November, 1848. In the present case, *Smallcombe* was released on the terms referred to in that circular. It is true that he was released at a date by several months subsequent to that stipulated for in the *Chippenham* arrangement. But this does not seem to me material; for, in the first place, there is no evidence that the exact terms of the *Chippenham* arrangement, as to the time within which the payments were to be made, ever were communicated to the absent shareholders; but, secondly, even if they were, I think it was obvious from the balance sheets, and so that the absent shareholders must have known that the directors had gone on acting on the assumption that they were at liberty to allow shareholders to retire on the terms indicated in the circular of the 2nd of November, 1848, even after the time originally contemplated had been suffered to pass. The absent shareholders knew, from the circular of the 2nd of November, 1848, that considerable numbers of shareholders were proposing that shareholders might retire, and have their shares cancelled, on payment of certain specified sums, according to the number of shares they held. The balance sheets shewed them that, from that time, the shares of a very large body of shareholders were from time to time cancelled. I concur with my noble and learned friend that the suggestion that shareholders might have supposed the shares referred to in the balance sheets to have been cancelled under the powers conferred by the deed of settlement, is one which, considering the great number of shares cancelled, cannot for a moment be listened to. When this cancellation took place on the payment of the sums mentioned in the circular, I think it was not competent to the absent shareholders to go on quietly in the absence of those who had been so allowed, though irregularly, to retire, and, after materially altering the terms of the partnership contract, and the obligations of the shareholders, to say that they had not sanctioned the retirement.

The grounds on which I come to this conclusion appear fully in what I have said in *Spackman's Case*, to which, therefore, I beg leave to refer. I think it right to say that the reason why this case has been re-argued is this, that the case having been very maturely and carefully considered by all the noble Lords who heard the argument, and Lord *St. Leonards* not having heard the

argument in this case, we ascertained amongst ourselves that we should be equally divided in the opinions we should be prepared to offer to your Lordships. Under these circumstances, we thought it due to the parties that the case should be re-argued under circumstances in which the difficulty of a divided judgment might not arise.

LORD CHELMSFORD:—

My Lords, I am glad that my noble and learned friend has given an explanation why we have had a second argument in this case; but although we have had the benefit now of the assistance of my noble and learned friend upon the woolsack, who agrees with my noble and learned friend who has last addressed your Lordships in the opinion which he has formed upon this case, I regret to say that, with all the respect which I entertain for their opinions, I cannot change the view which I took at the close of the first argument. And although, of course, I feel very great reluctance to express any opinion hostile to that which they entertain, yet I cannot help feeling that it becomes my duty to state what was the opinion I originally formed, and which I still retain upon the subject.

Mr. *Smallcombe*, no doubt, by signing the agreement of the 13th of November, entitled himself to whatever benefit would be derived from the *Chippenham* arrangement. This arrangement was undoubtedly *ultrà vires* of the directors. They had no power to permit any of the shareholders to withdraw from the company, nor to transfer their shares; nor could they declare a forfeiture of shares, except under the provisions of the deed of settlement. The *Chippenham* arrangement being, therefore, a departure from the deed which constitutes the contract between the members of the company, it could only be made good by the consent of every individual member composing the company. That consent might be either express, or might be inferred from the acquiescence of the shareholders after full knowledge of the transaction which was in excess of the powers of the directors. But the proof of acquiescence by a numerous body of dispersed shareholders must always be extremely difficult, as, in order to render the acquiescence of any avail, it must be co-extensive with the consent which would

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have been necessary to give validity to the transaction originally, that is, of every individual member of the company.

The Master of the Rolls, in his judgment in this case, said:—"Both in this and in *Brotherhood's Case* the time appears to me to bar any right which might have existed to set aside the transaction." But, with great submission, the question is not whether the transaction is to be set aside, but what was its effect upon the position of Mr. *Smallcombe* with relation to the company, and his liabilities consequent upon that relation. No mere length of time can alter the character of a transaction: "*Quod ab initio non valet in tractu temporis non convalescit.*" Length of time may, in many cases, materially assist in establishing the presumption of acquiescence in an act which requires confirmation to give it validity. But then it is not time, but the acquiescence, which changes what would otherwise be a void act into a valid one. In this case there is not only an absence of the requisite proof of the consent of each individual shareholder to the *Chippenham* arrangement, but there is positive evidence to the contrary. Several shareholders not only refused to accede to that arrangement, but one of them, Mr. *Spackman*, made it the ground of a Petition to the Court of Chancery for winding up the company. Subsequently, these dissentient shareholders arranged for their withdrawal from the company upon different terms.

The *Chippenham* arrangement, therefore, was never rendered valid by the consent of all the shareholders, and, consequently, the forfeiture of Mr. *Smallcombe's* shares under it was of no avail. The question is, what, under the circumstances, was his position at the time of the winding-up order? A great deal of argument was occupied—I am alluding to the former argument, of course—in considering what were the rights of the shareholders to contribution from Mr. *Smallcombe*, and what were the claims of the creditors upon him, especially of those who had become so after he had entered into the *Chippenham* arrangement. All these considerations are involved in, and will be determined by, the fact whether Mr. *Smallcombe* continued to be a member of the company. If the *Chippenham* arrangement had been originally valid, or had been subsequently sanctioned by every individual shareholder, Mr. *Smallcombe* would have regularly retired from the company. But

if the arrangement was invalid, and no consent of the shareholders accompanied or followed it, notwithstanding the length of time it had continued undisturbed, he still remained a shareholder in the company.

I am of opinion that there was no legal forfeiture of Mr. *Smallcombe's* shares, and that at the date of the winding-up order he still belonged to the company, and was liable to be placed upon the list of contributories.

Sir *Roundell Palmer* :—Your Lordships, not having heard me, of course will give me leave in this case to say a word upon the subject of costs. Although your recent practice has been to discourage that, after the case has been fully argued, I am sure your Lordships would be sorry not to hear what I have to say upon this point. This case has been selected and treated as a representative case, upon the ground that *Brotherhood* was saved by lapse of time, and that that case could not now be made the subject of appeal. In subsequent cases differences of opinion having appeared to exist as to the application of the principle laid down in *Brotherhood's Case,* the learned Master of the Rolls himself, as I am instructed, suggested that this case should be brought up by appeal, in order that, for the general purposes of the *Winding-up Act,* it should be finally determined whether or not that class of persons was to be restored to the list of shareholders. His Honour considered it right to give the costs of the application made to put Mr. *Smallcombe* upon the list, out of the estate. Of course, the official manager then took, and will now take, his costs out of the estate. If all parties get the costs of the appeal in like manner, justice will, as it seems to me, be done to all parties, bearing in mind that, according to your Lordships' judgment, the opposition is that of the official manager representing the acquiescing parties who are seeking relief against their own acquiescence. The official manager will get his costs paid out of the estate, and if the costs on both sides are not so paid, Mr. *Smallcombe's* estate, which is a very small one, will be, if I may use the term, victimised, by being made to bear the burden of the expenses of this litigation, which has been gone into for the purpose of settling the question in the winding-up.

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THE LORD CHANCELLOR:—I own I think it quite impossible that this winding-up could have gone on without this point being settled by your Lordships' House, and I think it a case in which it is very proper that the costs of both parties to this appeal should come out of the estate.

LORD CHELMSFORD:—I entirely agree in that suggestion.

LORD CRANWORTH:—It may be well to mention, for the satisfaction of the parties, that although two of my noble and learned friends, who heard this case before, are not attending now, the reason of that is that it was ascertained, on our communicating together, that one of them, the Master of the Rolls, concurred with me, and the other noble Lord concurred with my noble and learned friend on my left (Lord *Chelmsford*), and therefore there was no necessity for there being, as it were, more than one umpire.

It was "Ordered and adjudged, that the order of the Master of the Rolls, of the 21st of February, 1867, complained of be affirmed, and that the appeal be dismissed: And that the cause be remitted back to the Court of Chancery, with a direction to that Court that the costs incurred by the said Appellant *Lewis Henry Evans*, the official manager of the *Agriculturists' Cattle Assurance Company*, and by the said Respondents *Thomas Hughes*, Esquire, Member of Parliament, creditors' representative of the said company, and *Aaron Smallcombe* and *William Francis*, executors of the will of *Aaron Smallcombe*, in respect of the said appeal, be paid out of the assets of the said company."

Lords' Journals, 25th June, 1868.

Solicitors for the Appellant: *Horn & Murray.*

Solicitors for the Respondents, *Smallcombe's* Executors: *Wood, Street, & Hayter.*

HENRY HOULDSWORTH AND OTHERS, EXECUTORS OF THOMAS HOULDSWORTH (DECEASED) . . . . . } APPELLANTS;

AND

LEWIS H. EVANS (OFFICIAL MANAGER), AND THOMAS HUGHES (CREDITORS' REPRESENTATIVE) . . . . . } RESPONDENTS.

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[*See* SPACKMAN *v.* EVANS, *ante*, p. 171.]

Company—Directors' Powers—Dates.

Where a general meeting of the shareholders of a company had agreed to certain conditions on which dissenting members were to be allowed to retire from the company, one of which fixed the date at which assent to the arrangement was to be declared:—

Held, that that date was an essential part of the proceeding, and that the directors had no power, after the expiration of that date, to receive proposals and enter into arrangements with any member who desired to retire but had not expressed his wish to do so within the stipulated time.

But (*per* Lord *Cranworth*), where shareholders know that their directors have been exceeding their legal powers and take no steps in the matter, but allow the things done to remain unimpeached for years, they must be taken to have, retrospectively, sanctioned what has been done.

THIS was an appeal against an order of the Master of the Rolls (made without argument, after the decision by Lord Chancellor *Chelmsford* in *Stewart's Case* (1)), directing that the Appellants should be included in the list of contributories in respect of ten shares held by their testator in this company.

The general circumstances under which this claim for contribution was made have already been stated in *Spackman* v. *Evans* (2); the special circumstances under which the claim was resisted were these:—*Thomas Houldsworth*, the holder of ten shares, did not attend the meeting of the 13th of November, 1848, nor did he, on or before that day, send any letter declaring his intentions on the subject of that meeting. But on the 12th of December, 1848, a letter was sent on his behalf to the secretary of the company, ask-

(1) Law Rep. 1 Ch. Ap. 511.

(2) *Ante*, p. 171.

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ing, among other things, "whether the option remained to shareholders to forfeit their shares and retire, and, if so, on what terms?" On the 14th of December, the secretary answered, "The time has now elapsed permitted to shareholders to form their opinion, and no more can now retire." Some correspondence then ensued between Mr. *Thomas Houldsworth* and the secretary, and on the 31st of January, 1849, the secretary wrote to Mr. *Houldsworth*, saying, "If you are desirous of retiring from the company you can do so on payment of all calls, and a farther sum of £2 10*s.* per call, on receipt of which sum and your scrip, your shares would be cancelled." On the 12th of February, 1849, a letter in the name of Mr. *Thomas Houldsworth* was received by the secretary, in which it was said, "We avail ourselves of the option to withdraw from the company." There were several other letters relating to the amount due, but on the 10th of April, 1849, the company received the sum of £25 as due from Mr. *Thomas Houldsworth*, and took back the scrip then given up, and on the same day the directors passed a resolution that the shares should be cancelled, and that the secretary should make the proper return to the Registrar of Joint Stock Companies. This was done on the 17th of April, 1849, and since then Mr. *Houldsworth* had taken no part in the affairs of the company. On the 20th of January, 1866, the Appellants received notice from the official manager that Mr. *Houldsworth's* name had been included in the list of contributories. They appeared in opposition to this before the Master of the Rolls on the 10th of November, 1866, when His Lordship made the order now appealed against.

Sir *R. Palmer*, Q.C., Mr. *Pearson*, Q.C., and Mr. *G. Marten*, appeared for the Appellants.

Mr. *Amphlett*, Q.C., Mr. *Druce*, Q.C., and Mr. *F. W. Bush*, appeared for the Respondents.

For the Appellants it was contended (in addition to the arguments already advanced in the other cases), that no time was fixed within which members of the company were bound to accede to the terms of retirement agreed upon at the meetings of the 4th and 13th of November, 1848; that all the members of the com-

pany must be taken to have notice of what was done; and that there was perfect good faith in the case.

For the Respondents the arguments in the other cases were repeated, and it was, in addition, contended that assuming the *Chippenham* arrangement to be binding, Mr. *Houldsworth* had not duly complied with the terms of it, and that the special arrangement made with him was not assented to by all the shareholders.

The following cases were cited: *Whitmore* v. *Turquand* (1); *Ex parte Gouthwaite* (2); *Ex parte Blakeley's Executors* (3), and *Hamer's Devisees' Case* (4).

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, this is the third of the cases which have been brought before your Lordships by way of appeal in the matter of the *Agriculturists' Cattle Assurance Company*. In each of them the leading facts are the same, and the question which, as it seems to me, your Lordships have now to determine in this third case is, how to apply those general principles which you have already laid down in the two cases which have been disposed of.

My Lords, in the second of those cases, namely, the case of *Smallcombe*, your Lordships have considered that the compromise which has been termed the *Chippenham* arrangement, communicated as it was to the shareholders in the company, and I will not say acquiesced in (for that is hardly the fitting term), but not actively opposed by them during a long current of years, has become binding upon all the company in such a way as that it cannot be disturbed. In the first of the three cases, namely, that of *Spackman*, a shareholder who went out, or attempted to go out, not under the *Chippenham* arrangement, but under a compromise peculiar to the case of himself and a few other shareholders, your Lordships have held that there not having been that public communication of that particular compromise to the shareholders, the exit from the company of that shareholder could not be supported. Now, my Lords, the shareholder whose interests are connected with this appeal is Mr. *Houldsworth*, and the question which your Lordships, as it

(1) 1 J. & H. 444; affirmed 3 De G. F. & J. 107. 7 Jur. N.S. 377
(2) 3 Mac. & G. 187.
(3) 13 Beav. 133; affirmed 3 Mac. & G. 726.
(4) 2 De G. M. & G. 366.

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seems to me, have to determine is, did Mr. *Houldsworth* go out of this company under the terms of the *Chippenham* arrangement, as that arrangement ought to be understood and construed? If he did, then, as it appears to me, the case will be ruled by the decision in *Smallcombe's Case*. If he did not go out under the *Chippenham* arrangement, but went out under some other arrangement, then it will be for your Lordships to say whether any substantial difference can be taken between the principle applicable to this case and the principle which your Lordships have applied to the case of *Spackman*.

The only facts which in investigating this case your Lordships need be reminded of are these:—The *Chippenham* arrangement began, I think I may say, on the 2nd of November, 1848, the terms of it were communicated and defined on the 13th of November, 1848. Mr. *Houldsworth* was not present at, and did not in any way intervene in the negotiation for, and the settlement of, the terms of that arrangement. He, in fact, did not in any way indicate even his knowledge of the compromise until the 12th of of December, 1848, when he wrote a letter, which I shall have occasion to refer to, to the secretary of the company.

Now, was there, or was there not, anything in the *Chippenham* arrangement which confined its operation, as regards the persons who would be entitled to avail themselves of it, to the period antecedent to the 12th of December, 1848? For the purpose of answering that question I must ask your Lordships to consider the precise wording of the arrangement itself. But before I do that, I will take leave to remind your Lordships of the general position of the company, and of the circumstances which led to this arrangement being set on foot.

The company was in a very critical position; it had become considerably embarrassed; there was a large amount of debt actually owing, and for this there were no funds to provide. There was considerable division of opinion among the shareholders with regard to the policy to be pursued by the company for the future. There was a strong indication of a disposition on the part of a certain number of the shareholders to despair of the fortunes of the company altogether, and, if they could, to get quit of the company On the other hand, there were symptoms that some of the share-

holders thought well of the company, or, at all events, considered that if the company could be put upon a better footing, and some alteration made in its arrangements, it might yet be made to be a prosperous or thriving concern. In that state of things, if there was to be a compromise or arrangement entered into upon the footing of payments being made to the company, and thereupon of releasing shareholders from all future liability, and cancelling their shares, so that they might return to the common stock of the company, I think it is obvious that there could be nothing of greater importance than that it should be ascertained at the earliest possible moment, and in the most definite possible way. what funds, by means of this arrangement, would be coming to the company; what persons would avail themselves of the permission to leave the company; and who for the future must be looked to as the actually remaining shareholders in the company; who might be entitled to say, if the company did become a prosperous concern, that the benefit of that prosperity enured to them and not to those who had elected, or shewn a disposition to elect, to leave the company and forsake its fortunes.

My Lords, that being the general character of the arrangement indicated by the circumstances of the company, let me now refer for a moment to the wording of the documents which are before your Lordships upon the subject. Now, I take first the resolution which was proposed at the meeting on the 2nd of November, 1848; it was a resolution of adjournment, but it indicated on the face of it the purpose for which the adjournment was made:—

"That the meeting be adjourned to be held at the *New Hall, Chippenham*, on Monday the 13th of November instant, at ten o'clock precisely, and that all legal proceedings against shareholders, on the part of the company, be stayed until after that date, and that notice be given to all the shareholders of the proposal made by a considerable body of shareholders present personally, or represented, in order that their opinion might be taken thereof."

That was the resolution that was passed.

Then, on the 4th of November, 1848, a circular letter was sent by the secretary to the different shareholders in these terms:—

"SIR,—I am instructed by the directors of this company to inform you that the enclosed propositions were made by a considerable body of shareholders at the special general meeting held yesterday, and request that you will sign the accompanying form should you wish to retire from the company upon the proposed

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terms. The special general meeting has been adjourned to be held at the *New Hall, Chippenham*, on Monday the 13th instant, at twelve o'clock at noon precisely, and in case you should not attend, or return the accompanying form duly signed, on or before that date, you will be held as declining to concur in the proposition submitted to the meeting."

Then follow the terms proposed by the shareholders as to the payments to be made, and the amount of call, which I need not read to your Lordships; and then appended to those terms there was this blank form to be signed by the person receiving the letter who was minded to sign it:—"I beg to inform you that I am desirous of retiring from the *Cattle Assurance Company* on the above terms."

On reading these documents I own that I cannot entertain any doubt but that the main object of forwarding those propositions to each shareholder, and telling him that there was to be an adjourned meeting, and requesting him to sign the memorandum if he was disposed to sign it, was to enable the adjourned meeting, when it reassembled on the 13th at *Chippenham*, to know, as far as could be known, who were the persons who, under the arrangement that was proposed, would be desirous of leaving the company; and on the one hand contributing the sums which upon that footing they were to contribute, and on the other hand surrendering their shares for the benefit of the remaining shareholders.

My Lords, I think it matters not whether you interpret the words at the end of the circular, "and in case you should not attend, or return the accompanying form duly signed on or before that date, you will be held as declining to concur in the proposition submitted to the meeting," as meaning "if you do not sign the form you will be understood as refusing to assent to any shareholders leaving the company," or whether you interpret them as meaning, "if you do not sign the form, or attend at the meeting, you will be understood as saying that you do not mean that you wish to retire from the company." I think it matters not in the least which construction you adopt, because whether you adopt the one construction or the other, the consequence follows that the person who received the circular, and who did not either attend the meeting or return the circular signed, must be understood upon the face of it as not concurring in the arrangement that was proposed, either as objecting to it as a

whole, or as objecting to leave the company on the terms of it. In either view the person who so acted certainly could not be a person, I think, who could afterwards say that he had assented to the compromise or the arrangement, so far as the terms of this first document are concerned.

Then the adjourned meeting took place on the 13th of November, and now I come to the resolutions passed at that meeting. The first is this:—

"That the sums paid by retiring shareholders shall be paid into a bank in the names of the directors, Mr. *Jones*, Mr. *Goldney*, and Mr. *Mullins*. That the shareholders who have paid the call shall be allowed 5 per cent. interest to the present time."

pointing, therefore, to the present time, the date of the resolution, as that which, at all events for the purpose of calculating the interest upon the calls, was to be the critical point of time to be looked to.

Then it goes on:—

"That the following agreement between the retiring shareholders and Mr. *Deere*, on behalf of the shareholders continuing in the company be agreed to and confirmed."

I do not read this agreement at length, but I will direct your Lordships' attention to one or two features in it. In the first place the engagement to pay money is an engagement to pay it to the directors, "within one month of the date hereof," the date of the instrument being upon the face of it, the 13th of November, 1848. In the next place the object is stated to be—

"To effect a dissolution of partnership as regards ourselves in the interest of the said company, and making a return, under the provisions of the *Joint Stock Companies Act*, of a list of shareholders of the said company, exclusive of our names, so that as regards any future policies to be granted by the said company we shall be in no way responsible thereon."

"Future," of course, meaning obviously at a date subsequent to the date of the deed which is thus speaking; the object being that any one who comes to this agreement should be free from the responsibility upon the policies granted after the 13th of November.

Then it is provided—

"The directors shall enforce the payment of the instalment of £1 10s. per share on the said call against all shareholders who have not paid £1 on account of the call to be made, and 10s. per share on such shareholders who have paid £1 in advance

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of the call, on all parties not signing this agreement, the sums to arise from the instalments £1 10s. and 10s., and from the payments to be made by us, the undersigned, and also all moneys to be raised from calls now made or to be made, and moneys now due and owing to the company from agents or others, to be placed in the *London and Westminster Bank* to the credit of the directors and *Gabriel Goldney*, *Alfred Jones*, and *Richard Mullins*, on the part of the retiring shareholders, and to be appropriated wholly in liquidation of the existing debts and liabilities of the company of the under-mentioned total sums, one-half to be paid on the execution hereof, and the remaining half to be paid within one month from the date hereof."

My Lords, I do not understand the meaning of language if this means anything but that the parties were agreeing, so far as such an operation could be performed on a joint stock company, for a dissolution of the partnership to take place, and for accounts to be adjusted as at the date of the instrument which I am reading; and if that be so, the essence of the document was this, that the persons to whom it should apply should be persons coming in and assenting to it, whether by the execution of the deed or by mere assent is immaterial, but coming in and assenting to it at the time when it is made, and at which it bears date, they agreeing at that time that those who wished to leave the company should cease to be partners in the company, no longer liable for its engagements, and no longer entitled to any profits or earnings which it might make. My Lords, I am quite unable to place upon this document which I have read, or upon the documents which precede it, anything which would warrant the idea that if the agreement is to be collected from these documents, any person was to have benefit from it, or to be a party to it, who had not assented to it at the time when this agreement upon the face of it purports to have been made.

Well, my Lords, if that be so, I do not know whether it is material to consider what expressions were afterwards used by the secretary of the company in communicating that agreement to the shareholders in the company. If the communication made by the secretary fell short in stating what had been agreed upon, that is to say, fell short of stating an agreement as large as that which had been come to, it might become, under the question whether shareholders had notice or not, a subject worthy of consideration. But if it be the case (I do not at present say that it was the case) that the secretary went beyond the terms of the agreement in his statement, inasmuch as the question to be determined is, what was

the *Chippenham* arrangement? it appears to me to be utterly immaterial whether the secretary did or did not state that arrangement correctly in his letter.

However, a reference was made at the Bar to the letter of the secretary on the 25th of November, in which the secretary stated, that

"The directors deemed it advisable, in consequence of doubts having arisen as to whether some technical irregularity did not exist in the notice of the call made on the 3rd of August last, to make that call over again, giving those shareholders who have paid it credit for the amount paid, as paid in advance of the present call, and allowing them interest thereon accordingly, shareholders therefore electing to remain in the company who have duly paid the call of the 3rd of August last will be required to pay 10s. per share only, and those who have not paid that call £1 10s. per share only on account of this last call of £4."

It was said that the word "electing" in this letter meant shareholders who shall or may hereafter elect. Now the word as here used is of course equivocal, because it may mean either shareholders *who shall elect,* or it may mean shareholders *who have accepted the opportunity of election* which was given them by the *Chippenham* arrangement. But, however that may be, it seems to me impossible to suppose that the true and proper construction of the *Chippenham* arrangement, as we find it in its own documents, can be affected, and either enlarged or restrained by the statement of that compromise in this circular letter of the 25th of November.

But, my Lords, there are two circumstances which I should refer your Lordships to, as shewing to my mind very satisfactorily that there was no doubt entertained at the time as to the meaning of the *Chippenham* arrangement, and as to the persons who were entitled to the benefit of it, and that the meaning assigned to it at the time was the meaning which I have ventured to suggest to your Lordships as the proper meaning. One of those circumstances was this. I have already reminded your Lordships that it was on the 12th of December, 1848, that, for the first time, Mr. *Houldsworth* appears to have taken any notice of the *Chippenham* arrangement. He did that in a letter, which was written by his brother, dated the 12th of December, 1848, in which he writes to the secretary in these terms: he asks—

"The names of the directors; the nominal value of the shares; the number subscribed for; the number now in the hands of the public; the number of shares

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the owners of which have retired; the number of shareholders now liable for the present and future proceedings. Whether the option remains to shareholders to forfeit their shares, and retire, and if so, on what terms."

It is perfectly obvious that it was a matter of doubt in his mind, from the documents which had been communicated to him, whether any longer he had the option of retiring. Now what does the secretary say? The secretary, on the 14th of December, writes in these words:—"The time has now elapsed permitted to shareholders to form their opinion, and no more can now retire." A letter of a different complexion was afterwards written, to which I shall afterwards refer; but your Lordships do not find any explanation given of how it came to pass that this letter was written by the secretary, and I think it impossible not to see that this letter was written by the secretary in the ordinary course of his business, and was the expression, by him, of what he knew at that time was the mind and understanding of the directors of the company; and more than that, it was the expression, by him, of a fact which is of great significance with regard to the present inquiry. My Lords, I take this to be a statement by the secretary that the directors, at the time at which he was writing, had concluded and ended their action under the *Chippenham* arrangement, and that they had ceased at that time from receiving, or acting upon, any farther applications for retirement from the company upon that footing.

My Lords, at a later period, the 31st of January, another letter was written by the secretary to Mr. *Houldsworth*, and in that letter he says:

"In reply to your favour of the 19th instant, I am instructed by the directors to inform you that the deed of the company is too long to furnish you with a copy, but that it is open to you, either to yourself or your solicitor, whenever you may wish to see it, and that if you are desirous of retiring from the company you can do so on payment of all calls, and a farther sum of £2 10s. per call, on receipt of which sum and your scrip your shares would be cancelled."

My Lords, I think that is nothing more than this, that whereas on the 14th of December the directors thought and avowed that they ceased to have any power of acting any longer upon the *Chippenham* compromise, they changed their minds between that date and the 31st of January, and they were willing on the 31st of January, if they had power (which I think they had not), to

recommence acting in the direction of releasing shareholders from the company upon the terms of the *Chippenham* arrangement.

My Lords, the other circumstance which I said I thought your Lordships should bear in mind is this: when, after the 31st of January, the directors proceeded to apply, as they thought, the *Chippenham* arrangement to the case of Mr. *Houldsworth*, of course they found it was necessary to obtain his signature to an agreement in the form of the resolution approved of by the meeting of the 13th of November, and they sent that form to Mr. *Houldsworth* to be signed. The moment they came to prepare that form they felt the difficulty in which they were placed, and in order to solve that difficulty they sent to Mr. *Houldsworth* a form which did not tally with the form agreed to in the resolution of the 13th of November, because it omitted the date which was appended to the form given by the resolution—thereby entirely altering the contents of the instrument itself—because, inasmuch as there were frequent references to the date on the face of the instrument to which I have already called your Lordships' attention, the moment that date was omitted, and another date substituted, the agreement became, not the agreement which was approved by resolution of the meeting at *Chippenham*, but an agreement wearing an entirely different aspect in its terms.

My Lords, I ought, before leaving this subject, to make this farther observation. It was said in the argument, that it was entirely an irrational thing to suppose that the shareholders in a company of this kind, during the interval between the 4th of November and the 13th of November, would be able to satisfy themselves as to whether it was desirable, or not desirable, for them to come in under the *Chippenham* arrangement, and to leave the company. My Lords, if the period assigned was too short, the only consequence would be that the shareholders would lose that opportunity which was given them of coming into that arrangement, which might be either adopted or refused. But, in truth, there was no difficulty of that kind in the case, because what led to the arrangement (as I have already pointed out) was this, that the company was divided into two sections, that some were for going on, and some were for not going on. The only object, as I understand it, of adjourning this meeting and issuing the

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circular was, that it might become known at the adjourned meeting what were the relative proportions of those two sections of the company; and I believe, judging from the evidence in the case, that not only was ten days a sufficient time for that purpose, but that twenty-four hours, if there had been sufficient opportunity for answering by post, would have been quite sufficient; because I believe that the minds of the shareholders of the company had become agitated by the proceedings which had been taken in the company, and that all that was necessary to be known was upon which side each shareholder would be willing to range himself.

My Lords, if that is at all a true and proper view of the facts of the case, and of the construction to be put upon the documents, the general principles following from the case which your Lordships have already determined, appear to me to be most easy of application. If I am right in my view of the facts and construction of the documents, the arrangement under which Mr. *Houldsworth* left the company was not the *Chippenham* arrangement, but a different one. As regards the sum to be paid, it tallied with the *Chippenham* arrangement, but as regards the time of payment, and as regards the stringency of the *Chippenham* arrangement with reference to liability for the engagements of the company from the 13th of November, and abandonment of interest in the profits of the company, if there should be any, the arrangement which Mr. *Houldsworth* entered into was not the *Chippenham* arrangement, but was an arrangement which had its inception, not on the 12th of November, 1848, but upon the 19th of February, 1849, on which, for the first time, he became as one with the directors of the company as to his retirement from the concern. My Lords, if that is so, although the variations between the terms of Mr. *Houldsworth's* arrangement and the terms of the *Chippenham* arrangement were not so large as they were in Mr. *Spackman's* case, still, it seems to me, that the principle which led your Lordships to determine *Spackman's Case*, must lead to the same conclusion in the present case. In both cases the arrangement called the *Chippenham* arrangement, which was the only one disclosed to the shareholders, was a different arrangement from that under which both Mr. *Spackman* and Mr. *Houldsworth* retired,

and the only question remaining would be as to this new and different arrangement under which Mr. *Houldsworth* retired, whether it was in its turn communicated to the shareholders of the company.

My Lords, I find no evidence whatever of such communication. The only evidence that was attempted to be suggested was this, that in the three balance sheets in the years 1848, 1849, and 1850, certain aggregate sums are brought to charge, on the one side or the other, under the head of "cancelled shares," and that when you read these balance sheets, and go back to the day books and other books of the company, you find that these aggregate sums are, as to one of them, composed of the value of the shares of Mr. *Houldsworth*. But the question is, did the mention in the balance sheets of "cancelled shares" of itself convey to the minds of the shareholders the knowledge not merely that some shareholders had retired under the *Chippenham* arrangement, but that another shareholder, Mr. *Houldsworth*, had subsequently retired under another arrangement, which, if I am right, was not the *Chippenham* arrangement? My Lords, I think it is impossible to ascribe that effect to the mere mention of "cancelled shares," which might well be shares cancelled under the *Chippenham* arrangement, because it might be quite possible that, from delay in paying the instalments or calls, those shares might not be brought to charge, and, in point of fact, some of them were not brought to charge until a year later, so that the terms "cancelled shares" might refer to shares strictly and legally forfeited under the *Chippenham* arrangement. But, at all events, just as I think your Lordships, in the case of *Spackman*, if you had nothing in the shape of disclosure to the shareholders but the mention of cancelled shares in the balance sheet, would not be disposed to hold that to be sufficient information to the shareholders, so here I think your Lordships can hardly hold that if this arrangement be not the *Chippenham* arrangement, but a different one, the mention of cancelled shares in the balance sheets was notice of this arrangement.

My Lords, I therefore advise your Lordships that this appeal should be dismissed, and the only question remaining is the question of costs. In the case of *Spackman* you thought it right that the appeal should be dismissed without costs. That was a case in

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which a shareholder was the Appellant. In the case of *Smallcombe* your Lordships had before you as an Appellant the official liquidator, who, as we were informed, in bringing an appeal in that case as a sample of others, had the sanction of the learned Judge from whom the appeal came. In that case—inasmuch as if you had dismissed the appeal without costs, the effect would have been virtually to leave *Smallcombe*, the successful party, to bear his own costs—you thought it right, under the circumstances of the case, that the costs of all parties should be provided out of the estate. In the present case we have again an instance of a shareholder who, like Mr. *Spackman*, appeals here against the decision by which he is fixed as a contributory to the company, and I think it would be right that the appeal should be dismissed without costs, as was done in *Spackman's Case*, and then I think your Lordships will have acted, as to costs, upon an intelligible and consistent principle throughout.

LORD CRANWORTH:—

My Lords, it is my misfortune in this case to differ from the conclusion at which my noble and learned friend on the woolsack, and, I believe, also my noble and learned friend on my left (Lord *Chelmsford*), have arrived. In the case of a difference of opinion in the ultimate Court of Appeal it is always very satisfactory to know that the difference is not a difference arising from any doubt as to the principles by which the case ought to be governed, but merely as to the application of the principles to the particular case. Now, that is the only difference in this case between my noble and learned friend who has just addressed your Lordships and myself. I think with him that it is a most essential proposition, to be rigidly enforced, that in these joint stock companies absent shareholders should never be bound to do anything more than to assume that the directors are doing their duty, unless in cases where they are informed that although the directors have not intended to defraud the company, yet, exercising powers not legally conferred upon them, they have gone beyond what they ought to do. If, with knowledge of that fact, the shareholders remain a long time, and take no step whatever, still more if they so remain while great alterations are going on in the company,

they must be taken to have retrospectively sanctioned what has been done.

Now, my Lords, I put my views of the principles of law upon this subject in as condensed a form as I could in the first of these cases that came before this House, the case of *Spackman,* and I do not intend to trouble your Lordships again in this particular case. The only question here is this:—There has been a divergence from the *Chippenham* arrangement in this respect—that whereas the *Chippenham* arrangement provided that the persons agreeing to that arrangement were to pay one-half of the sums that were applied to their shares in the signing of the agreement, namely, on the 13th of November, and the other half within a month from that period, which would be on or before the 13th of December, the terms on which Mr. *Houldsworth* was allowed to retire were exactly the same as those terms, except that they were not entered into at the date of the *Chippenham* arrangement, nor, indeed, till several months afterwards. Mr. *Houldsworth* applied very soon after the date of the *Chippenham* arrangement to know whether he could get out of the company, and there was a little difference about it. First of all, the secretary wrote one thing, and afterwards he wrote another, but eventually Mr. *Houldsworth* and the other Appellants wished to retire, and the directors allowed them to retire upon signing an agreement similar to that which was agreed to at *Chippenham,* except that it had no date put to it. In the copy I had there was no date. I suppose that was the case also in the original.

[Mr. *Amphlett*:—That is so, my Lord.]

LORD CRANWORTH:—It was found that the date was inapplicable, and therefore they left it out, the directors having allowed these parties to retire five months after the date of the *Chippenham* arrangement.

Now, my Lords, the question is, whether the absent shareholders had notice, or that which must be considered notice, that in respect of the date, at all events, the directors had diverged from what had been sanctioned at *Chippenham.* If they had not, I think, though it certainly would be somewhat unjust, that the principles of *Spackman's Case* would apply. But here it appears to me that, looking

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at all the facts of the case, it is impossible to say that the absent shareholders had not notice, for this reason. Let us see exactly what it was that they had notice of. The first intimation that the shareholders got was by the letter of the 4th of November. By that letter they were informed that a considerable body of shareholders had wished to retire, and that there was to be a meeting on the 13th, at which it was to be proposed that they should retire upon certain terms, which I may designate as the *Chippenham* terms; except with reference to the date of the meeting there is no mention of date there. Well, the meeting took place at *Chippenham* and those terms are adopted, except that, upon the formal agreement being drawn up, the term is added that the shareholders agreeing to come into this agreement are to sign this agreement, and to pay one-half of the sums agreed upon on the 13th of November, and the other half on or before the 13th of December. That, I must observe, was never communicated to the absent shareholders, they did not know that there had been that term of the date inserted. I do not, however, absolve them from notice of that, because I think they did know that the details of the scheme were to be settled on the 13th, and it would, therefore, be very difficult to say that they had not notice that it was open to the shareholders at the meeting on the 13th of November to make certain alterations in the terms.

Then the next intimation which reaches the shareholders is the letter of the 25th following up the letter of the 4th, calling for the £4 per share, and explaining why they had adopted a call of £4 instead of £3. In fact, it was no substantial alteration; it was only an alteration of the form, enabling the company to get more conveniently payment of the calls which had been made. Then it ends, "shareholders, therefore, electing to remain in the company who have duly paid the call of the 3rd of August last, will be required to pay 10*s.* per share only, and those who have not paid that call £1 10*s.* per share only, on account of this last call of £4." Now, I think that a shareholder on receiving that letter, and coupling it with the preceding letter of the 4th of November, inasmuch as the letter of the 4th of November had said nothing about any particular date, and as the letter said that shareholders electing to retire are to pay so and so, conformably to the letter of

the 4th of November, would necessarily infer that shareholders electing not to remain in the company, but to retire from the company, were to pay according to the notice which had been given in that letter, namely, a certain proportion according to the value and number of their shares. That is the notice which they got, and everything that was done was in conformity to those two notices. Because nobody could say that the arrangement made in this case would not come within the fair meaning and scope of the two notices, putting out of the question the actual detail of the dates fixed by the *Chippenham* arrangement. That being so, if those were the only terms of the agreement, I should say that the shareholders, having had notice of them, were clearly bound, because they went on for years without making any complaint or taking any steps upon the subject. Applying strict principles to the case I quite agree with my noble and learned friend that, inasmuch as the shareholders knew by the notice of the 4th of November that the terms were to be settled in form, or that they might be altered in any way at *Chippenham*, they must be taken to have had notice of what was done at *Chippenham*, and I will take it that they had notice that at *Chippenham* it was said "You must pay your agreed amount, one-half on or before the 13th of November, and the other half on or before the 13th of December." Assume that to be so, had the absent shareholders, or had they not, notice that that part of the arrangement had been entirely departed from by the directors—wrongfully, if you please, but departed from. I think, my Lords, that they had, because I think it is impossible that they could have misunderstood the three balance sheets, one of them being a balance sheet for two successive half years, ending in June and December, 1848; the next being for the half year ending in December and the 30th of June, 1849; and the next being for the year ending the 30th of June, 1850. In the balance sheets for all these periods, ending in 1848, 1849, and 1850, there were three entries. In the first two there were entries of very large amounts of "cancelled shares," in the last, not so large, but still considerable.

Now, I cannot listen to the suggestion that the absent shareholders might have thought that those were shares forfeited under the terms of the deed because the parties had become insolvent—

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that is preposterous. Although I would allow the greatest latitude to the principle that shareholders are not bound to inquire, one cannot suppose that they thought anything so absurd as that more than half the shares of the company had been forfeited because the holders had become insolvent—coupling that with the notices which they had received, we may fairly conclude that they must have supposed that during this period the directors had been taking upon themselves to cancel the shares. If so, they must have known that the directors were doing something which, according to the terms of the *Chippenham* arrangement, taking time as part of the arrangement, they were not authorized to do. Well, but it was a divergence from what they were authorized to do of the minutest importance, and they might think it very unimportant to them whether the money was paid a little sooner or a little later.

Now, I say they must have known it. It occurred to me, however, at one time that perhaps they did not know it, for they might think that although the parties had come into those terms at the proper date the shares had not been forfeited till later. But that could not be, they must have known that the entries were made when the agreements were made with persons to forfeit their shares. Why do I say that? The shares could not be forfeited till two months after there had been default. Then there could have been no shares forfeited appearing in the balance sheet ending with the year 1848, because two months had not elapsed. Therefore, the shareholders must have known that those entries of forfeited shares did not relate to the time when, in point of form, the forfeiture was to take place, but to a later time when the directors agreed with parties to let them out upon those terms.

My Lords, under these circumstances I own that it appears to me that the shareholders must be taken to have had notice that in that respect, in point of date, the arrangements that had been made at *Chippenham* were not adhered to. That might have been very good reason for any of those who had entered into that arrangement, saying, "I will not be bound by it, because you have gone on allowing shares to be cancelled after the time when you were authorized to allow them to be cancelled." But they did not interfere, and not having so interfered, I think, for the reasons

which I put forward more at length in the judgment in *Spackman's Case*, that they ought to be bound. Now, one word as to the judgment in *Spackman's Case;* my opinion in *Spackman's Case* was (and I believe I so expressed it) that if at the time that that arrangement was entered into, the directors had written, or *Spackman* had written, to every shareholder, saying that *Spackman* had been let out, but not on the terms of the *Chippenham* arrangement, telling them what the terms were, I should have held that *Spackman* was certainly not liable, any more than I think that the *Houldsworths* are now liable. The difference between the two cases is this: that in this case there were communicated to the shareholders, as I think, facts which shewed that the directors could not have been acting in conformity with the *Chippenham* arrangement in point of date. But in *Spackman's Case* there was not communicated anything which shewed to them that the terms in point of money payment upon which *Spackman* was allowed to retire were different from that of the *Chippenham* arrangement.

My Lords, I thought it my duty to the parties to shew that I did not differ from my two noble and learned friends in this case without having well considered the subject; but having done so, it is a great satisfaction to me to know that I concur with both my noble and learned friends upon the general principle, and only differ from them on the ground that I think the variations from the terms of the *Chippenham* arrangement were substantially communicated to the shareholders in this case, and that therefore they were not entitled to set aside the arrangement.

LORD CHELMSFORD:—

My Lords, the question to be decided upon this appeal is whether, assuming the *Chippenham* arrangement to have been valid, any shareholder could have the benefit of it who did not accede to it on or before the 13th of November.

It appears to me that the proposed arrangement was of a nature to require that a certain day should be fixed for its completion. There were liabilities pressing upon the company, and a schism amongst the shareholders, some wishing to break up the company, and some to continue it. Under these circumstances, it was essential that the directors should know by a certain time

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whether they would have funds to meet their liabilities, and what shareholders were disposed to retire, and what to remain. According they fix upon the day of the meeting (the 13th of November) as the day upon which they were to be definitively informed upon these points. The agreement which the retiring shareholders were to sign was dated on this day. Under it the retiring shareholders were to pay the amounts set opposite to their respective names within one month from the date; and at the meeting it was resolved, that the shareholders who had paid the call should be allowed 5 per cent. interest "to the present time." I am satisfied that it was the original intention of the directors that it should be determined, on the day named, who were the retiring and who the continuing shareholders, and that they never contemplated at the time it was proposed to the shareholders, that the *Chippenham* arrangement should be a standing offer to the shareholders to retire from the company on the terms proposed at any subsequent period. Nor could the shareholders, whose acquiescence would alone give validity to the arrangement, understand it in that sense. Supposing that all the shareholders must be presumed to have acquiesced in the *Chippenham* arrangement, and so to have given it validity, they could only be taken to have consented to it in respect of those shareholders who came in under it, in compliance with what they must have understood to have been its terms. Therefore, assuming the *Chippenham* arrangement to have been valid, Mr. *Houldsworth* was excluded from its benefit by not having made his election to avail himself of it in due time.

5 Ch 731

I must notice an objection which was made on the part of the Appellants on the former argument, because if well founded, the Appellants ought to prevail upon this appeal. It was objected that they, as executors of Mr. *Thomas Houldsworth*, were not shareholders in the company at the time of the winding-up order, and that consequently they were not liable to be placed on the list of contributories. In support of this objection, reference was made to the 173rd clause of the deed of settlement of the company, by which it is provided that the executors or administrators of deceased shareholders shall not be holders of any shares, nor entitled to receive any dividend which may be appropriated and declared

thereon after such death, but that such dividends shall remain in suspense until some person shall become a shareholder in respect of such shares. And also to the 25th and 26th sections of the 7 & 8 Vict. c. 110, by which remedies are given against shareholders in a company, but none against their representatives. And the case of *Ness* v. *Armstrong* (1) was cited, where the deed of settlement of a joint stock banking company-partnership, established under the 7 Geo. 4, c. 46, provided that the executor of a deceased shareholder should not be a member of the company in respect of such shares, but should be at liberty to sell the shares, or, at his option, to become a member upon complying with certain provisions, and that if he did not elect to become a member he was not to be entitled to any dividend accruing after the testator's death, and it was held that the executor of a deceased shareholder who received a dividend which accrued due after the death of his testator, but had not complied with the provisions of the deed of settlement, was not a member for the purpose of execution against him by *scire facias* upon a judgment against the public officer of the company.

I think that neither the clause of the deed nor the provisions of the Act of Parliament, nor the case in the Exchequer, prove that the executors ought not to be placed upon the list of contributories. They merely shew that an executor is not a shareholder in name, and that therefore remedies which are given against shareholders will not reach executors as such. But granting this, it does not follow that they are relieved from all liability in respect of the shares of their testator. In considering this point it must be taken as if Mr. *Thomas Houldsworth* had died possessed of his shares. They would unquestionably have formed part of his personal estate, and though his executors would not have had the *status* of shareholders they would have been owners of the shares. And it would be a strange result of this state of things that, because they were not nominally shareholders they were relieved from all liability.

But the liability of an executor to be placed upon the list of contributories where the testator died possessed of shares before an order for winding up a company had been made, upon the ground

(1) 4 Ex. 21.

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that the estate of the shareholder continued liable, is established by the case of *Blakesley's Executors* (1), affirmed upon appeal (2) and by *Ex parte Gorthwaite* (3).

The Appellants have no claim to be excluded from the list of contributories, and the decree appealed from ought therefore to be affirmed, and the appeal ought to be dismissed, and, I agree with my noble and learned friends, without costs.

It was Ordered and adjudged, That the said Order of the Master of the Rolls, of the 10th of November, 1866, so far as complained of in the said appeal, be affirmed, and that the appeal be dismissed. And that the costs incurred by the Respondents *Lewis Henry Evans*, the official manager of the *Agriculturists' Cattle Assurance Company*, and *Thomas Hughes*, Esq., Member of Parliament, the creditors' representative in respect of the said appeal, be paid out of the assets of the said company.

Lords' Journals, 26th June, 1868.

Solicitors for the Appellants: *Thomas & Hollams.*
Solicitors for the Respondents: *Horn & Murray.*

(1) 13 Beav. 133. (2) 3 Mac. & G. 726.
(3) 3 Mac. & G. 187.

HENRY HUSSEY VIVIAN . . . . . APPELLANT;

AND

TREW JEGON AND H. ERNEST . . . . . RESPONDENTS.

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June 26, 29.

Power—Lease.

A gift of a power to lease mines and minerals, following the gift of a life estate in the real property of which they form part, though expressed in general terms, does not of necessity imply a power in the tenant for life to make a lease exceeding the term of his own life.

A. devised his estates to his daughter for her life, without impeachment of waste, and then to her issue, male and female, and in default of such issue, over. The will gave the daughter, or any person in possession under the limitations in the will, power to work or to make a lease of the mines. She was to receive and pay over to trustees the rents and profits of the mines, which were to be applied to the purchase of other estates, of which she was to receive the rents for her own life. While in possession she made a lease reciting the will, and granting a term of sixty years:—

Held, that the lease was not warranted by the power, for that on the whole will it appeared to be the intention of the testator to restrict her to making a lease for her own life only.

THIS was an appeal under the *Common Law Procedure Act*, 1854, against a decision of the Court of Exchequer Chamber, which had reversed a previous decision of the Court of Common Pleas. The case has already been fully reported (1). The following is a summary of it so far as is necessary for the present report.

Leonard Bilson Gwyn was seised in fee (among other property) of certain mines in the county of *Caermarthen*. He had one child, a daughter. In March, 1798, he made his will, by which he gave certain personal estate to his daughter, and the residue of the personalty to trustees to pay debts, and if the personalty was not sufficient, then by sale or mortgage of certain real estates, specifically mentioned, to satisfy them. And as to his other real estates he gave them to "my dearly beloved daughter *Catherine Middleton Gwyn*, and her assigns, for and during the term of her natural life, without impeachment of or for any manner of waste," then to her sons in strict settlement—then to her daughters; in default, he empowered his daughter to devise by will the said

(1) Law Rep. 1 C. P. 9; and Law Rep. 2 C. P. 422.

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estates to persons whom he specifically named, and in default of her so doing he devised the same to his nephew, the Reverend *Thomas Powell*, and his heirs. After certain other provisions the will went on thus:—"I empower my said daughter, and all and every person or persons who under the limitations of this my will, when they respectively shall become seised and possessed of my said real estates may, and I do hereby expressly empower them respectively, to grant leases of all or any part or parts of my said real estates not devised for payment of my debts, for the term of twenty years and no more," taking the best rent and commencing in possession, &c., and with a special reservation in each lease "empowering my daughter during her life, and such persons as shall respectively become possessed of my real estates after her decease," to search for and carry away coal and culm, &c. And he directed, "that neither my said daughter, nor any other person entitled to the possession of my real estates, shall have any right" to grub up or cut down timber, &c., except for absolutely necessary reparations, "until the expiration of the aforesaid term of twenty years." Then came this clause: "It shall and may be lawful for my said daughter to work, or contract for, lease, or set out to be worked and wrought, all coal, culm, lime, rock, and all ironstone, lead, copper, and tin mines, or any other ore, mine and minerals whatsoever, which are already, or may be hereafter, known and discovered in such of my real estates as are not specifically devised for payment of debts; and that all the issues and *neat* proceeds and profits arising therefrom shall, as the same arise, be paid over by my daughter to my trustees" in payment of debts, &c., "after payment of the whole thereof, that my daughter should, with the consent of my trustees, punctually, and as occasion and opportunity shall offer," lay out the same in the purchase of real estates, which were to be conveyed to the same uses and trusts, and to be subject to the same limitations, as his real estates not specifically bequeathed for the payment of his debts. And the rents were to be received by his daughter, for her life; and the trustees, "with the consent of my daughter, or the person who shall be possessed of the estates by virtue of the limitation in this my will," were to have power to exchange his lands for others of equal or superior value.

The daughter, after the death of the testator, entered into pos-

session of the estates, and married Count *de Wuits*, but never had any issue. On the 2nd of May, 1840, she granted a lease (which recited the will) of certain of the mines, "during and unto the full end and term of twenty-one years (and if the said *Catherine Middleton Gwyn*, Countess *de Wuits*, has power or authority to appoint or demise the same by the said power of leasing contained in the said will), for the term of sixty years, to commence or be computed from the 25th day of March last." She died on the 6th of December, 1840, and the intermediate estates having failed, *T. G. L. Carew Powell* became entitled in remainder to the estates of the testator. He was then an infant, but became of age in 1846. The interest of Mr. *Powell* became vested in the Respondents, who, in 1861, when the lease, assuming it to be a lease for twenty-one years, expired, brought ejectment against the Appellant, the representative of the lessee, to recover possession of the mines. The cause was tried before Mr. Justice *Blackburn*, at *Swansea*, in the spring of 1865, when a verdict was entered for the Defendant, with leave to move the Court above to enter the verdict for the Plaintiffs. A rule was obtained, and on argument it appeared that the Judges were equally divided in opinion, but the rule was discharged (1), as Mr. Justice *Smith* withdrew his judgment in order to enable the parties to take the case into Error. This was done, and the judgment was reversed (2). This appeal was then brought.

Sir *R. Palmer*, Q.C., and Mr. *H. Giffard*, Q.C. (Mr. *G. B. Hughes* was with them), for the Appellant:—

The terms creating the power in this will are empowering, not restrictive. The power is of a fiduciary character, to be exercised for the benefit of the estate. It could not have been intended to be restricted to the granting of a lease for life. That would be contrary to the practice of law, and to the object of the testator. A gift of an estate for life carries with it the power to make a lease for life, and the addition to the gift of the estate of a power of leasing, if intended to be restricted in this way, would be perfectly needless, for every tenant for life may aliene the estate for his own life. When, therefore, the power is added to the gift of the estate, the fair construction is that the power is something

(1) Law Rep. 1 C. P. 9. (2) Law Rep. 2 C. P. 422.

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different from, and in excess of, that which would have arisen as a mere accessory to the gift of the estate for life. *Hele* v. *Green* (1) expressly recognised the principle, and declared that where there was a general power to a tenant for life to grant a term, the grant of a term beyond this life was good, though it might defeat the remainders over. This power must receive a similar construction. It was clearly the intention of the testator that it should do so. He desired to obtain profits from the working of the mines, and he gave his daughter a general power to lease them. If the lease could only be granted for her life, nobody would have accepted it, the mines would have been unworked, and one great object of the testator would have been defeated. Lord *Mansfield* felt the force of such a consideration as this when, in *Taylor* v. *Horde* (2), he insisted on the necessity, for the common benefit of the possessor and successor, of construing these powers in a liberal manner. The same principle had been recognised in the earlier case of *Berry* v. *White* (3), and again very recently in *Ferrand* v. *Wilson* (4), and the *Earl of Shrewsbury* v. *Keightley* (5). And in *Campbell* v. *Leach* (6), which was a case of mining leases, the Court, in order to sustain a lease made by the tenant for life, presumed a surrender of a former lease, and the disputed lease, though made for twenty-six years, when the power named twenty-one years only, and though made without any express reference to the power, was held valid. *Shannon* v. *Bradstreet* (7) is to the same effect. In *Sheehy* v. *Muskerry* (8) Mr. Baron *Alderson* said (9): "There is no case to be found in our books in which a lease conformable to the literal tenor of the words in which the power is given has been held invalid at law, on the ground of any supposed or real hardship thereby inflicted on the remainderman; and it would be strange if such a case could be found, for, as the remainderman takes what is given to him subject to the power, he must take the advantage *cum onere*." *Doe* d. *White* v. *Simpson* (10), and *Doe* d. *Keen* v. *Walbank* (11), shew that where the words of a power are indefinite,

(1) 2 Roll. Abr. 261, pl. 10.
(2) 1 Burr. 60, 120.
(3) Sir Orl. Bridg. Rep. 82-90.
(4) 4 Hare, 344.
(5) 19 C. B. (N.S.) 606.
(6) Amb. 740.
(7) 1 Sch. & Lef. 52, 61.
(8) 1 H. L. C. 576.
(9) Ibid. 584.
(10) 5 East, 162.
(11) 2 B. & Ad. 554.

as they are here, they shall be liberally construed in order to give effect to the general intent. Here the intent was to confer a benefit on the daughter, and with reference to that intent this power must be construed. In *Langston* v. *Blackmore* (1) it was held that where there had been a power created for the benefit of children the exercise of it by conferring a benefit on the issue of one of the children, though it went beyond the limits of the power, was good. The principles to be deduced from these cases therefore favour the construction put on this will in the Court of Common Pleas, and shew the power to have been well executed, and the lease to be valid.

The word "lease" is a word which must receive a liberal construction, and is not always to be restrained by words found in its immediate neighbourhood. The rule of *noscitur a sociis*, as it had been applied in *Sanderson* v. *Dobson* (2), is not applicable here.

[*Sugden* on Powers (3), *Ackland* v. *Lutley* (4), *Ackland* v. *Pring* (5), *Pigot* v. *Garnish* (6), and *Doe* d. *Tomkyns* v. *Willan* (7), were also referred to.]

Mr. *Manisty*, Q.C., Mr. *Joshua Williams*, Q.C., and Mr. *J. O. Griffits*, for the Respondents, were not called on.

THE LORD CHANCELLOR (Lord *Cairns*), after stating the nature of the case, said:—

The limitations in the will of the testator were, in the first place, limitations to trustees of certain parts of the testator's real estate, which were to be sold by the trustees as soon as might be after his death, for the purpose of providing for the payment of any debts which his personal estate might be insufficient to satisfy; and with regard to all the residue of his real estate, in which was comprised the mineral property in question, the testator devised it in these words:—[His Lordship read the devise.]

My Lords, in the subsequent part of the will certain provisions are contained with regard to timber, modifying and curtailing, to some extent, the absolute power over timber which, under the

(1) Amb. 289.
(2) 1 Ex. 141.
(3) 8th Edit. chap. 8, s. 2.
(4) 9 Ad. & E. 879.
(5) 2 Man. & G. 937.
(6) Cro. El. 678.
(7) 2 B. & Ald. 84.

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unimpeachability for waste, the daughter would otherwise have had; and then comes the clause under which the present question arises. My Lords, that clause, as to the early part of it, is in these words:—[His Lordship read it.]

It is contended that, under this clause, the daughter had a power of leasing the mineral property, not merely for her own life, but for any period, or, as it was explained at the Bar, any reasonable period that might be found necessary in order to make a beneficial practical lease of the mineral property.

Upon that contest, in the first place, it is proper to say that it would appear to me to be very much at variance with the general scheme of the will of this testator, that if he intended that an unlimited lease of the mineral property might be made to enure beyond the life of the daughter, that lease and the making of it should be intrusted, not to the trustees in the will, but to the daughter. Where a testator provides for the sale of real estate (and a lease of mineral property is in very few respects different in substance from a sale), he provides that the sale shall be conducted by the trustees; and that they shall sell for the best price, and the power of sale is otherwise qualified in the manner usual in such cases. But, according to the argument of the Appellant, it must be held, that although these provisions were made by the testator with regard to the sale, yet that when he came to the leasing of mineral property he gave the power to lease that mineral property for any time, and without any restraint, to his daughter, other than the restraint arising from the direction that the rents and profits should be invested, and that she should be tenant for life only of the invested funds.

But, my Lords, passing from that, you will also observe that the clause I have read provides for the daughter not merely leasing but working the mines. The words are, "it shall be lawful for my daughter to work, or contract for, lease, or set out." Now it would be in harmony with the recognised principles of construction to hold that words which are thus placed together are to be construed in *pari materiâ*. It is quite obvious that the power to the daughter to work the mines is a power which cannot be exercised after her death. It must be a power co-extensive with her own life. It would be somewhat singular, therefore, to find that one of the

verbs used here should point to a benefit terminating, so far as the daughter is concerned, with her life; whereas another, the verb "lease," should extend beyond her life to an indefinite period of time. But, beyond these observations, I think there are, in the latter part of this sentence, matters which indicate, beyond all doubt, that what was here provided for was to take place in the lifetime of the daughter.

The circumstances which, in my mind, are quite conclusive, are these:—In the first place, there is the provision that "all the issues and *neat* proceeds and profits arising therefrom shall from time to time, as the same shall arise, be paid over by my said daughter to my said trustees and their heirs." The payment to the trustees, which was to result in capitalizing the rents and profits, was to be a payment made by the daughter, and therefore ending, as regards the extent and ambit of the payment, with her life. Farther than that, it is also said, "after payment of the whole thereof" (that is, after payment of the debts mentioned before) "that my said daughter should, by and with the consent of my said trustees, punctually, as occasion and opportunity shall offer, lay out the same in the purchase of real estates in the several parishes of *Llanon* and *Llangendeirne*, in the county of *Caermarthen*." The laying out and investing of the rents and profits arising from the leasing is to be done by the daughter; and, therefore, the investments must take place in her lifetime. Farther than that, it is said, "the rents and profits" of the purchased premises "shall be received by my said daughter in the same manner as the rents and profits of my said real estate are directed to be paid to and received by her for the term of her natural life," pointing, therefore, to an investment which was to result in benefit to the daughter, no other person being pointed out as following her in receiving those rents.

My Lords, this becomes the more marked when we notice the contrast between the provisions I have read and the provision which immediately follows this clause. For your Lordships will observe that with reference to the power of exchanging the testator says:—"My will and directions are, that my said trustees, and the survivor of them and their heirs, by and with the consent of my said daughter, or the person who shall be possessed of my

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estates, by virtue of the limitations in this my will contained, shall and may exchange," and so forth. When, therefore, he came to a power which clearly was to run beyond the life of the daughter, to be exercised during minorities, or other subsequent circumstances, he clearly specifies that that was a power to be exercised by the trustees—not by the daughter—but by the trustees with the consent of the daughter, or the person who shall be possessed of the estate, under the limitations contained in the will.

My Lords, it appears to me that according to the true construction of this clause, it clearly would be applicable only to the life of the daughter and no farther. And the only force, in fact, which I myself felt in the argument of the Appellant at your Lordships' bar, was this:—It was contended that if you give an estate to *A.* for life, and then give a general, undefined power of leasing to *A.*, inasmuch as the gift of the life estate would carry with it a power of leasing limited to the life of the tenant for life, the donee of the power, therefore, it was said, it must be a necessary inference that in giving to the tenant for life a power to lease, a lease was meant going beyond the life incumbency. There would be some plausibility in that argument if you could not account, on any intelligible principle, for the express donation of a power to lease to the tenant for life. But in this case the clause is clearly effective. It clearly performs a duty which the testator had in his mind. In the early part of his will he had made his daughter tenant for life without impeachment for waste. If he stopped there she would have been entitled not only to work the mines herself, but to allow other persons to open and to work them. And she would have been entitled to all the rents and profits derived from that working as her own absolute property. But the testator desired that that should not be her position—he desired that, although she should have the power to open and work the mines, and to lease them, the rents and profits should be impounded and invested, and that she should be the tenant for life only of the estates purchased by means of those rents and profits.

It is said, however, that no person would be found to take a lease where the lease was subject to the uncertainty of the duration of a life interest. My Lords, I doubt very much whether that observation can be justly applied to the whole of the subject matter in

this clause. There are in this clause some subject matters, such as lime, rock, and some other minerals, as to which it seems by no means clear that a tenant would not be found very willing to take a lease of those minerals, even subject to the uncertainty of the duration of life. And it is possible that, with regard to minerals requiring greater outlay, arrangements, in the nature of insurance, might be made which would make the lease tolerably safe. In fact, in the very case before your Lordships which has raised this question, it appears that the tenant took the lease with the full possibility before his eyes that the lease for sixty years might not be a good one, because it is a lease framed in the alternative, either for twenty years, or for sixty years if the daughter was able to grant a lease for so long. But, after all, considerations of this kind are only matters of speculation and of probability. It may have been an ill-considered thing on the part of the testator, if he wished his minerals to be worked, not to have given power to grant a lease for a longer term in the way that is usual in such cases. But considerations of that kind cannot, as it appears to me, weigh against the natural and proper construction of the words, which, in my opinion, is such as to render it impossible for any lease to be supported made by the daughter for a longer period than her own life. I therefore would advise your Lordships that this appeal should be dismissed with costs.

LORD CRANWORTH:—

My Lords, I entirely concur in what my noble and learned friend has said, and I have very little to add. Had this power been simply a power to lease and work the mines there would have been (as my noble and learned friend has suggested) great force in the argument that something must have been intended more than the daughter would have had by virtue of her life interest. But that is not the object of this power. It is not so much a power as a restriction. What the testator says is this: "If by virtue of your life interest you work these mines, mind I do not mean that you are to have the profits. Whatever you get by so doing must be invested for the benefit of the fee simple of the estate." I think that is clearly what was meant. Without going the length of saying that, if the power of leasing the mines had been given *simpli-*

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citer, without saying for how long, no case could arise in which you might say that it meant for ninety-nine years, at all events it must be an extreme case to enable you to come to such a result, and to put such a construction on the words. But there is no necessity at all for it here. Here it all coheres together. Everything done that is done with reference to the power is to be done by the daughter. She is to apply the rents and profits; and the lands to be purchased by means of the rents and profits are to be purchased by her with the consent of the trustees. I think the case is clear beyond all reasonable doubt.

LORD COLONSAY:—

My Lords, I think the construction which is proposed to be put on the words of this deed is the only construction that is consistent. I think it is very clear that the maker of this will meant to limit, not to extend, the power of the life-renter with regard to the mines, and meant to appropriate the proceeds of them to some other purpose than her immediate use. Then does it appear that he intended that that separate appropriation should go on after her death, in reference to those proceeds of the estate that were to be realized during the possession of the proper owner of the estate? Clearly not. But if the daughter was to be empowered to grant leases going beyond her own lifetime, and if, as the words of the deed express, all the proceeds of this lease were to be applied to the purchase of lands, then that would be applying to the purchase of lands those proceeds of the mines that arose after her death. Now, I think that is clearly not the purpose here; and it is impossible to sustain the contention of the Appellant unless you give it that construction. I observe that in the Court below the leading opinion in favour of the present Appellant does put that construction upon the deed; but it is a construction that I cannot go along with. Therefore I entirely concur in the judgment proposed to be pronounced.

Rule of the Court of Exchequer Chamber appealed from affirmed, and appeal dismissed, with costs.

Lords' Journals, 29th June, 1868.

Attorney for the Appellant: *W. M. Hacon.*
Attorney for the Respondent: *J. Lott.*

THE EARL OF HARRINGTON . . . . . APPELLANT;

AND

THE COUNTESS (DOWAGER) OF HARRINGTON, LADY GERALD EVELYN STANHOPE AND OTHERS . . . . . RESPONDENTS.

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5 H.L. 88

Power—Provision for Younger Children.

A., tenant for life in possession, joined with *B.*, the next heir, in the settlement of certain estates. The settlement contained, among other things, a power for *B.*, in case of the death of his first wife and his marrying again, to charge the settled estates with portions for the younger children of his second marriage, the amounts being regulated with reference to the number of children that might be born of the first marriage. The deed contained a proviso that if the brothers of *B.* should, respectively, come into possession of the settled estates, "either before or after their marriage with any woman or women," they might charge all or any part of the estates with "the like sum or sums of money for the portion or portions of their child or children (other than an eldest or only son) as the said *B.* is entitled to do before or after his marriage with any woman or women after the decease of his first-taken wife by virtue of the provision hereinbefore contained":—

Held (*dub.* Lord *Cranworth*), that this was an absolute power, which, with reference to a younger brother of *B.* succeeding to the settled estates, was not subject to the restrictions and contingencies which applied to *B.* himself in making a charge for the children of his second marriage.

IN the year 1804, *Charles*, third Earl of *Harrington*, was tenant for life in possession of certain settled estates. On the 20th of July in that year an indenture of settlement was made, to which he and his son *Charles* (called Viscount *Petersham*) were parties, which, after providing for his children by a first marriage, contained the following provisions with regard to children of a second marriage:—"That if the woman with whom the said Viscount *Petersham* shall first marry shall die in his lifetime, it shall be lawful for him, either before or after his marriage with any other woman, by deed or will, &c., to charge all or any part of the said estates with the payment of any sum or sums of money for the portion or portions of any child or children of him, Viscount *Petersham*, by any after-taken wife (other than an heir apparent, &c.), the sum or sums following, that is to say:—In case there

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shall be issue of Viscount *Petersham* on the body of his first wife begotten, one only son and no daughter, or one or more daughter or daughters and no son, then any sum or sums of money for the portion or portions of the child or children of Viscount *Petersham* by such after-taken wife (other than an heir apparent), not exceeding in the whole the sum of £3000 for the portion of one such child, or the sum of £5000 for the portions of two or more such children, but in case there shall be no child of the said Viscount *Petersham* on the body of his first-taken wife begotten, or, being such, all of them shall die before any of them, being a son or sons, shall attain twenty-one, or, being a daughter or daughters, shall attain twenty-one or be married, then any sum or sums of money for the portion or portions of the child or children of the said Viscount *Petersham* by any other after-taken wife (other than, &c., as aforesaid), not exceeding in the whole the sum of £5000 for the portion of one such child, or the sum of £10,000 for the portions of two such children, or the sum of £12,000 for the portions of three or more such children." There was then a provision that the several other children of the said Earl, namely, *Lincoln Stanhope*, *Leicester Stanhope*, *Fitzroy Stanhope*, *Francis Charles Stanhope*, *Henry Richard Stanhope*, and *Augustus Stanhope*, respectively, in case they should come into possession of the estates by virtue of limitations thereinbefore contained, "either before or after their intermarriage with any woman or women, to charge all or any part" of the said estates, "with the like sum or sums of money for the portion or portions of their child or children (other than and except an eldest or only son) as the said Viscount *Petersham* is enabled to do before or after his intermarriage with any woman or women after the decease of his first-taken wife, by virtue of the provision hereinbefore contained," such portion or portions to be raised out of certain settled estates, which were not in any case to be charged with more than £24,000.

Charles, the third Earl, died on the 15th of September, 1829, and his son, Viscount *Petersham*, became the fourth Earl. He married but once, and had two children, a son, who died at the age of five years, and a daughter, now Countess of *Mountcharles*. He died in March, 1851, and his wife and daughter survived him. On his death the title and estates devolved upon *Leicester Stanhope*,

the third son (his elder brother, *Lincoln Stanhope* having died childless in 1840), who thus became fifth Earl of *Harrington*. He was married, and had four children, two sons, *Algernon Russell* (who died in 1847 at ten years of age) and *Seymour Sydney*, and two daughters, Lady *Anna Carolina*, who married Mr. *Edward Chandos Pole*, and Lady *Geraldine Evelyn*, the present Appellant.

The fifth Earl, who was only once married, made two appointments under his charging powers, by the first of which, dated the 16th of May, 1856, he charged all the estates, subject to the power, with the payment of £5000 as portions for his two daughters. On the 30th of January, 1862, he executed another appointment to a similar amount. He died in September, leaving his wife and son and daughters him surviving. He, in 1862, was succeeded by his second-born and only surviving son, *Seymour Sydney*, who became sixth Earl of *Harrington*.

On the 25th of May, 1864, Lady *Geraldine Evelyn Stanhope* filed her bill in Chancery against her brother, the sixth Earl, praying that proper directions might be given for raising the portions created by the deeds of 1856 and 1862. The case came on for hearing before Vice-Chancellor *Stuart*, who, on the 15th of March, 1865, made a decretal order in accordance with the prayer of the bill.

Seymour Sydney, the sixth Earl, died on the 22nd of February, 1866, being then in the twenty-first year of his age, and a bachelor. On his death, the title and estates descended to his cousin, the Respondent, *Charles Wyndham Stanhope*, the seventh and present Earl. The cause in Chancery having abated by the death of the sixth Earl, the present Earl obtained an order of revival against all the necessary parties, and then appealed against the decretal order of the 15th of March, 1865.

Mr. *Baggallay*, Q.C., and Mr. *Walford*, for the Appellant:—

The power created in the deed of 1804 was to be exercised only on the happening of certain events. The deed supposed the death of the first wife, the existence of children by the first marriage, a second marriage, and children by that marriage, and then gave a restricted power of appointment for their benefit. Whatever power to create portions for children of a second marriage is given to

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Charles the fourth Earl, is, and is alone, given to any subsequent tenant for life. All the restrictions introduced with respect to the second marriage of the fourth Earl are applicable, under any circumstances, to the succeeding tenants for life, who are not empowered to create any charges for younger children except as he might create them with reference to the children of his second marriage. The fourth Earl had no power under this deed to portion younger children of a second marriage, for his wife did not die in his lifetime, and the event which was to call the power into existence did not arise; the fifth Earl had no power to portion younger children at all. [THE LORD CHANCELLOR:—Then what is the meaning of confining all the portions that may be granted within the limit of £24,000.] It was plainly the object under any circumstances to restrict the granting of portions, so as not to derogate too much from the value of the estate, which was to support the title; and there might be more than one tenant for life who married, had children, and on the death of his wife married again, and thus, literally fulfilling the conditions of the deed of 1804, might be entitled to exercise the power. So it was necessary to limit the amount of the charges that might, in that way, be made. The conditions of the power must be construed literally and strictly. The fifth Earl had no power to charge the estates, or, if it should be held that he had, it was restricted to raising a sum of £5000 for the two daughters, and these grants of 1856 and 1862 are in excess of it.

Mr. *Bacon*, Q.C., and Mr. *Rowcliffe*, appeared for the children, and Mr. *Greene*, Q.C., and Mr. *Gardiner*, for the trustees, but did not address the House.

Mr. *C. Hall* (with whom was Sir *R. Palmer*, Q.C.), for the Countess Dowager of *Harrington*:—

This is an absolute power: it is not declared to be exercisable only on the events which are applicable to the exercise of the power in the case of Lord *Petersham*, who became the fourth Earl. As to him there were contingencies—as to the succeeding tenants in tail there is nothing of the sort. It is clear by the limit of the charges to £24,000, that it was presumed that there might be two

or three or more charges on the estates, and there is nothing in the deed which says that such charges are only to be made under the same circumstances as might be required with regard to the first. The construction attempted by the other side would go to this extent, that if the fourth Earl had died a bachelor no succeeding tenant for life could have a power to make a provision for his younger children, which it is impossible to believe was intended. It was not necessary for a succeeding tenant for life to be twice married before he could exercise the power. He could exercise it as soon as he came into possession of the estates.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the facts in this case and the question in dispute lie in a very narrow compass. [His Lordship stated them].

By the settlement of 1804 provision was made for the first family of Lord *Petersham* who had that title at the time of the settlement, in the event of his marrying, a provision by way of contract—an absolute stipulation that the younger children of the marriage should be provided for. Over and above that a power was given to the then Lord *Petersham*, in the event of his contracting a second marriage, to make a provision for the children of that second marriage. That power, as regards the amount of the provision to be made, and the amount to be charged upon the estate, was to depend upon two considerations. In the first place, the amount was to be greater or less, according as there should turn out not to be, or to be, children of the first marriage. And, in addition to that, the amount, as is usual in such cases, was also, to a certain extent, to depend upon the number of the children of the second marriage who had to be provided for. Then, my Lords, the settlement, after giving this power to Lord *Petersham* with regard to the second marriage, proceeded to confer upon the subsequent tenants for life of the settled estates, the younger brothers of Lord *Petersham*, a power to provide for their younger children by any marriage, in words which refer to the power that had been given to Lord *Petersham* with regard to his second marriage, and, in substance, authorized the succeeding tenants for life to charge upon

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the estates, for the benefit of their younger children, the like sum which Lord *Petersham* was enabled by the settlement to charge for the children of his second marriage.

My Lords, if the matter had stood there alone, without going into any minute or critical examination of those words, I should have entertained no doubt but that, there being in Lord *Petersham* a power to charge a greater sum if there were no children of the first marriage, and a lesser sum if there were children of the first marriage, when, with reference to succeeding tenants for life, it was said that they should be able to charge the like sum that Lord *Petersham* might charge upon his second marriage, it meant nothing more than that any sum which Lord *Petersham* on his second marriage could charge, the succeeding tenants for life might charge for the benefit of their younger children, and that therefore the measure of the power given to the succeeding tenants for life was to be the greatest measure of power which could be exercised by Lord *Petersham*.

But, my Lords, when we turn to the precise wording of the power the matter becomes still more clear. I think, beyond all doubt, that the mere perusal of the power would satisfy any reader of it that it was intended to be, with regard to the younger brothers of Lord *Petersham* and the subsequent tenants for life, an absolute power, enabling them, to some extent or other, to provide for their younger children. The only question of doubt, as it seems to me, which could arise upon the power, would be the extent to which the provision could be made. The assumption of the clause throughout appears to me manifest, namely, that *Lincoln Stanhope*, *Leicester Stanhope*, *Fitzroy Stanhope*, *Francis Stanhope*, *Henry Stanhope*, and *Augustus Stanhope*, successively, as they might come into possession of the settled estates, should have power, to some extent or other, to make provision for their younger children.

Now, my Lords, if that is so, if it is an absolute power to make provision for younger children to some extent, the only way by which you can secure the result of it being an absolute power to operate in any event, is by divesting the words of reference in the clause of all contingencies which are personal to the case of Lord *Petersham*; because, my Lords, if you introduce the contingencies

which are personal to the case of Lord *Petersham*, the result may be, nay more, the result in a very probable event would be, that in place of this being a power to make an absolute provision for younger children, it will be a power that will evanesce altogether, and no provision can then be made.

Take, my Lords, a case which is by no means improbable, and which might well have been considered probable at the time the settlement was made, although in the result it did not happen. Suppose that the Lord *Petersham* called by that title at the time of the settlement, had not married at all. He might not have married a first time, and in that case you would have been wholly unable, with regard to him, to predicate what would have been the amount of charge which, in the event of his marrying a second time, he would have been authorized to make for the benefit of the younger children of the second marriage. The result might have been that Lord *Petersham* had died a bachelor, and there would not have been one shilling charged upon the estate for the benefit of his younger children. And though the other brothers would, in succession, have come into possession of the estate, yet because you could not predicate what would be the amount of the charge that Lord *Petersham* might have made for children of the second marriage, these other brothers coming into possession of estates unencumbered with any portions for previous younger children, would have had no capacity of charging for younger children of their families. My Lords, that is a consequence so utterly absurd that unless you were driven to it by words from which there is no escape, your Lordships would be very unwilling to incur. You will not, except upon compulsion, put such a construction upon the settlement.

But, my Lords, there is no necessity to put any such construction upon it, for the words are capable of giving a power to the successive tenants for life to charge any sum that Lord *Petersham* might have charged independently of any contingency which is is applicable to him.

My Lords, I therefore submit that the course your Lordships ought to take is, to affirm the judgment of the Vice-Chancellor and to dismiss this appeal; and, under such circumstances, of course to dismiss it with costs.

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LORD CRANWORTH:—

My Lords, any one must feel very diffident of his own opinion in construing a complicated instrument when he has the misfortune to differ from the other noble and learned Lords, and also from the decision of the Vice-Chancellor. This is the position in which I stand, and I feel bound to say so, although of course it is useless in the Court of ultimate appeal to argue such a question. My Lords, the principle which I go upon is this. I do not feel the difficulty of my noble and learned friend as to the circumstances under which the power would arise, because whether there was a first marriage or not, or whether there was a first marriage having issue a son, who never attained twenty-one, both of those cases come within the contingency of a marriage and a son, or in case there should be no child of the first wife, that would be a case which would bring the power into operation. The only question is, what amount is to be raised. If I had had to construe this settlement I should have said that you must construe that power as exercised by *Leicester Stanhope* just as if instead of *Leicester Stanhope*, Lord *Petersham* had been exercising it upon his second marriage; and all the contingencies which applied to Lord *Petersham* I should have thought would have applied to *Leicester Stanhope* when he exercised it. That, my Lords, is the construction which I should have put upon the instrument in question; but I feel little doubt that I should have put a wrong construction upon it, inasmuch as the learned Judge in the Court below, and my noble and learned friends, have each put a different construction upon it. It was my duty to state my views to your Lordships, but I do not desire to enter farther into the discussion.

LORD WESTBURY:—

My Lords, my noble and learned friend on the woolsack has stated in a very concise and convincing manner the construction which, I think, ought to be given to this instrument, and there is little or no necessity for any farther statement on my part. But in consequence of the doubt which has been expressed by my noble and learned friend opposite, as to which doubt we should have been glad, if my noble and learned friend had desired it, to give an opportunity for farther consideration, I will merely say that I

cannot myself entertain any serious difficulty on either of the two points which have been urged for the Appellant.

My Lords, with respect to the first contention of the Appellant, viz., that the power would never arise in favour of *Leicester*, the fifth Earl, if it did not arise in favour of *Charles*, Viscount *Petersham*, I cannot for a moment suppose that any such meaning as that can be imputed to the deed; because it is obvious, as my noble and learned friend on the woolsack has observed, that that would make the condition of the subsequent tenants for life such as would be utterly at variance with the very principle of the settlement itself. For supposing that *Charles* had died without ever having been married, or supposing that *Charles* had had a son and a daughter, and that they had died immediately after the death of the father, in their infancy, then, according to the contention of the Appellant, the younger sons, the brothers of *Charles*, would never have had any power of charging the estate at all with provisions for younger children. That certainly could not be the intention. It is impossible to conceive that it could have been intended by this settlement, that the person in possession of the estate should not have been enabled to make some provision for younger children. It cannot be supposed that the younger brothers of *Charles* were to be deprived of the power of charging at all, if the power never arose in favour of their elder brother *Charles*.

Then, my Lords, the next contention on the part of the Appellants was, that it was impossible to determine what sum was to be raised under the power, and that, therefore, there was an uncertainty, or that the power was so complicated by a reference to the first marriage of *Charles* that no power could be extracted from the words applicable to that referred marriage, and made applicable to *Leicester Stanhope* and the other tenants for life in succession, so as to give them a power of charging a definite sum. But I think it is clear from the words of reference that they incorporated that power which *Charles* might have executed upon his second marriage, to the full extent to which he could have exercised it, supposing the circumstances of *Charles* when he exercised it to have been the same as the circumstances of *Leicester*. The words of the power are "other than and except an eldest or only son." Now, supposing *Leicester* to have had an eldest son and

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younger children, then he would have the same power of charging as *Charles* would have had if he had had an eldest son and younger children. There can be no difficulty at all in holding that so much of the power referred to as is excluded by the very terms of the reference shall not be considered as incorporated by virtue of the reference, but that part of the power referred to is to be incorporated which is applicable to the circumstances which are defined, and under which the reference is made. Now, the circumstances which are defined, and under which the reference is made, are the first marriage of *Leicester*. That, of necessity, precludes the possibility of incorporating, by virtue of the reference, words in the power which are applicable only to a second marriage, and which refer, of course, to an antecedent event. You must therefore take the power given to *Charles* on his second marriage without those words which are contained in it which refer to the event of the preceding marriage; and if you do that, it is clear and unambiguous, and the same power is given to *Leicester* as *Charles* would have had if, after his second marriage, he had an eldest son and several young children. The words of reference are, that on the occasion of the first marriage of these younger sons, as they shall come successively into actual possession of the property, they shall be at liberty to charge the property "with the like sum or sums of money for the portion or portions of their child or children (other than and except an eldest or only son) as the said *Charles* Viscount *Petersham* is enabled to do before or after his intermarriage with any woman or women after the decease of his first-taken wife by virtue of the proviso hereinbefore contained." It would be idle to deprive this settlement of all efficacy by insisting upon incorporating the words of reference together with those expressions which refer to an event which the terms directing the words to be incorporated of necessity preclude.

My Lords, I regret to differ from my noble and learned friend opposite, but I think there is no ambiguity or doubt in the case which ought to make us hesitate in affirming the decision of the Court below, and dismissing this appeal. As in this case this appeal has been brought on behalf of the inheritance upon which the portions have been charged, and it is unsuccessful, the inheritance must bear the costs.

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LORD COLONSAY:—

My Lords, for the reasons which have been stated by two of my noble and learned friends, I cannot adopt the view contended for by the Appellants that there was here no power of charging the estates. I think the reasons against that proposition are so cogent that it is impossible to resist them. The only real question is as to the amount of the sums which could be provided. It appears to me that there is here given a power, which existed under the deed, to provide in the event of a second marriage for the children of that second marriage. That read by itself would, I apprehend, mean a full power. But in confirmation of that, I would say that the full power which is given (being a power to provide to the extent of certain sums not exceeding £12,000) is only limited in the event of preceding circumstances having existed which would have restricted or excluded that power, and which preceding events do not exist in this case. We are here dealing with a party who has no children of a previous marriage to provide for, and the power which he possesses is the power that is to be exercised under the deed in that event. My Lords, for these reasons I concur with two of my noble and learned friends that the decree of the Court below ought to be affirmed.

Decree affirmed; and appeal dismissed, with costs.

Lords' Journals, 9th July, 1868.

Solicitors for the Appellant: *F. & H. Walford.*

Solicitors for the Respondents: *Gregory, Rowcliffe, Rowcliffe, & Rawle*; and *M. K. Braund.*

Definition of conspiracy, at p. 317, *applied*. R. *v.* WEST & OTHERS. [1948] 1 All E.R. 718.

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June 29, 30; *July* 3, 10.

DENIS DOWLING MULCAHY . . PLAINTIFF IN ERROR;

AND

THE QUEEN . . . . . DEFENDANT IN ERROR.

Indictment—Pleading—Jury Lists—Continuances—Sworn and affirmed.

The 3 & 4 Will. 4, c. 91 (*Irish Jury Act*), makes a clear distinction between disqualification and exemption. Where, therefore, a juryman was returned whose age exceeded sixty years, that fact only operated in his favour as an exemption, but was not a ground for challenge as a personal disqualification.

The statute directs a jurors' book to be made up in each year for use in the year following, and declares that such book shall be in use from the 1st of January for and during one year. In November, 1865, at a sitting of a special commission, a panel was returned from the then existing jury book; the jurors were not then called, but the sitting was duly adjourned to the 19th of January, 1866, at which time the trial took place, when the jurors named in the return of November, 1865, were called:—

Held, that this was not a ground of challenge to the array.

One of the jurors, who had been duly returned in November, 1865, was not on the list for 1866:—

Held, that that was not a ground of challenge to him.

Conspiracy cannot exist without the consent of two or more persons, and their agreement is *an act* in advancement of the *intention* which each of them has conceived in his mind.

The 11 Vict. c. 12, intituled "An Act for the better Security of the Crown and Government of the *United Kingdom*," declares it to be felony to "compass, imagine, invent, devise, and intend to deprive and depose our Lady the Queen," &c., &c. In support of the charge of this offence under the statute, it is sufficient to allege as overt acts that the Defendants conspired, combined, confederated and agreed to commit the offence.

Where there are several overt acts charged in a count, and a judgment is given on a general verdict of guilty on that count, such judgment will be sustained, though some of the matters alleged as overt acts may be improperly so alleged, provided that the count contains allegations of overt acts that are sufficient and are sufficiently alleged.

The allegation, in one count, of several different overt acts of felony is not objectionable under the 11 & 12 Vict. c. 12.

Semble, no objection to the caption of an indictment for an allegation that the grand jurors were "sworn and affirmed" can be sustained without shewing that those who were sworn were persons who ought to have affirmed, or that those who were affirmed were persons who ought to have been sworn.

THIS was a writ of Error brought to reverse a judgment of the Court of Queen's Bench in *Ireland*, pronounced in Hilary Term,

1867, against the Plaintiff in Error, upon a conviction for treason felony. The trial had taken place under a special commission, which began its sittings on November 28, 1865, when a true bill was found, and farther proceedings were then adjourned to the 19th of January, 1866. The record alleged the indictment to have been found on "the oath and affirmation" of the jurors therein named, who appeared in Court, and were "then and there sworn, affirmed, and charged to inquire," &c. *Mulcahy* was indicted with five other persons under the 11 Vict. c. 12, intituled "An Act for the better Security of the Crown and Government of the *United Kingdom*." The indictment contained three counts. The first charged that the Defendants "after the passing of the *Crown and Government Security Act*, to wit, on the 1st day of January, A.D. 1863, and on divers other days, as well before as after that day, did feloniously and wickedly compass, imagine, invent, devise, and intend to deprive and depose our Lady the Queen from the style, honour, and royal name of the Imperial Crown of the United Kingdom of *Great Britain* and *Ireland*, and the said felonious compassing, imagination, invention, device, and intention, they, the said Defendants, &c., feloniously and wickedly did express, utter, and declare by divers overt acts and deeds hereinafter mentioned, that is to say," &c. Several matters were then alleged as overt acts. The form in which they were alleged was as follows: "In order to fulfil, perfect, and bring to effect this felonious compassing, imagination, invention, devise, and intention aforesaid, they, the said Defendants, &c., afterwards, to wit, on the 1st day of January in the year aforesaid, and on divers other days, as well before as after that day, feloniously and wickedly did combine, conspire, confederate, and agree with" (nineteen other persons, all named), "and with divers other evil-disposed persons, to the jurors aforesaid unknown, to raise, make, and levy insurrection and rebellion against our said Lady the Queen within this realm." Another overt act alleged was a conspiracy with the same parties "to move and stir up certain foreigners and strangers, and certain citizens of the *United States of America*, and persons resident in *America*, with force to invade that part of the United Kingdom of *Great Britain* and *Ireland* called *Ireland*." Other matters alleged as overt acts were, the being and becoming mem-

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bers of an association called the *Fenian Brotherhood*, having for its object the overthrow of Her Majesty's power and authority in *Ireland;* the knowing of the existence of a treasonable association in *America* called the *Fenian Brotherhood*, and aiding its treasonable objects by publishing pamphlets in *Ireland* intended to excite rebellion. Other matters alleged as overt acts were, like this last, matters of fact and not of mere intention. The same form of allegation was used as to all these overt acts, namely, "afterwards, to wit, on the said 1st day of January, and on divers other days, both before and after that day."

The second count charged the Defendants that they "feloniously and wickedly did compass, imagine, invent, devise, and intend to levy war against our Lady the Queen in *Ireland*, in order, by force and constraint, to compel her to change her measures and counsels, and the said last-mentioned felonious compassing, imagination, invention, devise, and intent, the said Defendants feloniously and wickedly did express, utter, and declare by divers overt acts and deeds hereinafter mentioned, that is to say," and then came what was nearly a repetition of the overt acts alleged in the first count.

The third count alleged as the offence that the Defendants, after the passing of the Act "for the better Security of the Crown and Government of the *United Kingdom*," to wit, on the 1st day of January, A.D. 1863, and on divers other days, as well before as after that day, feloniously and wickedly did farther compass, imagine, invent, devise, and intend to move and stir certain foreigners and strangers with force to invade that part of the *United Kingdom* called *Ireland;* and the said last-mentioned felonious compassing, &c., they did feloniously express, &c., by divers overt acts and deeds hereinafter mentioned, that is to say," and then followed allegations and statements of overt acts similar to those in the preceding counts.

The record then contained the entry of the adjournments and continuances from Tuesday, the 28th of November, 1865, to Friday, the 19th of January, 1866, and alleged that on that day *Mulcahy* came in his proper person, and having heard the indictment, he, protesting that he is not guilty, demurred thereto, because it charged that he expressed and declared the said several felonious compassings, &c., by divers overt acts and deeds, which are not,

nor is any of them, set out with singleness or certainty, or with proper averments, that as to each the allegations were double, and were informal and defective, &c., and that he is not bound to answer the same, wherefore he prays judgment, &c., and that he may not be compelled to answer the same.

The Attorney-General joined in demurrer, and prayed "judgment, and that *Mulcahy* may be compelled now to answer the said indictment."

The judgment of the Court was that the matters objected to "are not sufficient in law to prevent *Mulcahy* from being compelled to answer the said indictment, and that the said *Mulcahy* do now answer the said indictment."

Mulcahy then pleaded not guilty, whereupon the record alleged "the sheriff of, &c., is by the Court here commanded that he cause immediately to come before the justices," &c., a jury, "and the jurors of that jury, by the said sheriff of, &c., for this purpose impanelled, and here returned, being called thereupon came." *Mulcahy* then challenged the array on the ground that the jurors then called were returned out of the jurors' book for 1865, and not for the year 1866, being the now current year." The Attorney-General, by counter plea, alleged that the panel was duly arrayed and returned by virtue of a precept dated the 6th of November, 1865, issued by the justices on that day, whereby the sheriff was commanded to return the panel on the 27th of November, 1865, and that he did so; that the jurors did come on that day, that the commission commenced its sittings on that day, and "had been thence hitherto duly continued, and still and now is sitting in continuance of its sittings of the 27th of November, 1865." *Mulcahy* demurred to this counter plea, but the demurrer was overruled. *Mulcahy* then made several peremptory challenges which were allowed. He then challenged one *Henry Fry*, on the ground that *Henry Fry's* name (though on the jurors' book for 1865) was not on the jurors' book for 1866. This challenge was, after counter plea and demurrer, disallowed. *H. Fry* was then challenged peremptorily, and the challenge was allowed. On the name of *James Booth* being called, *Mulcahy* challenged him because he was not a person between the ages of twenty-one and sixty, but was above sixty-one years of age. This challenge was overruled.

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Booth was then challenged peremptorily, and the challenge was allowed (1). The jurors were then sworn, the trial proceeded, and on the 21st of January a verdict of guilty was pronounced, and the prisoner was sentenced to ten years' penal servitude, the sentence being entered on the record as pronounced on each count of the indictment. Error was alleged, the case was argued in the Court of Queen's Bench, and the judgment was in all respects affirmed (2).

The present proceeding in Error was then brought.

The Judges were summoned, and Mr. Justice *Willes*, Mr. Baron *Bramwell*, Mr. Justice *Blackburn*, Mr. Justice *Keating*, and Mr. Baron *Pigott* attended.

Mr. *Butt*, Q.C. (of the Irish Bar), and Mr. *Coleridge*, Q.C. (Mr. *Constantine Molloy*, of the Irish Bar, was with them), for the Plaintiff in Error:—

The first objection relates to the form of the indictment. It is an indictment under the *Treason Felony Act*, and therefore re-

(1) As to the making up of the jurors' book:—The 3 & 4 Will. 4, c. 91, directs how returns of persons qualified to serve of juries are to be obtained, and by sect. 9, directs the justices at a special session in October of each year, to revise and amend the lists, then to make out one general list from the rest, and deliver it to the clerk of the peace, who is to copy it into a book, and to deliver it to the sheriff of the county, which "book shall be called the jurors' book for the year (inserting the calendar year for which such book is to be in use), and every sheriff on quitting office shall deliver the same to the succeeding sheriff, and such jurors' book shall be brought into use on the 1st day of January, after it should be so delivered to the sheriff, and shall be used for one year next following."

The 11th section directs the sheriff not to return to any *venire* the names of any persons not inserted in the jurors' book for the then current year: "Provided that if there is no jurors' book for the current year, it shall be lawful to return jurors from the jurors' book of the year preceding," &c.

As to the challenge on account of the age of the juror, the following provisions were referred to, 3 & 4 Will. 4, c. 91, s. 1:—"The sheriff of any county, &c., in *Ireland* shall not in answer to any writ of *venire facias*, or precept for the return of jurors, return the names of any persons not qualified to serve on juries according to the provisions of this Act, and that every man, except as hereinafter excepted, between the ages of twenty-one years and sixty years, residing, &c., shall be qualified with respect to property, and shall be liable to serve on juries," &c.

The 20th section declared that "if any man shall be returned as a juror who shall not be qualified according to this Act, the want of qualification shall be good cause of challenge," &c.

(2) Ir. Law Rep. 1 Q. B. 12.

sembles an indictment for treason, and must be as strictly framed. It is not so here. The 11 Vict. c. 12, makes it unlawful to compass, imagine, invent, devise, and intend to deprive and depose the Queen, and the indictment charges the Plaintiff in Error and others that they did so feloniously compass, &c., and then it pretends to set out the overt acts which are necessary to make out the charge, all of which, except one, are laid on the 1st of January, 1863, and "on divers other days, as well before as after that day." Now, many of the supposed overt acts are alleged to be conspiracies for treasonable purposes, without anything which can properly be called an act done in pursuance of such conspiracies. That is not sufficient. Two things are necessary to make out the charge under this statute—the compassing or intending to do the forbidden thing, and an overt act, or act done in pursuance, and for the advancement of, such intention. But conspiring and compassing are not acts, they are merely intentions of the minds of those who are alleged to conspire and combine. The indictment would not be good if it merely alleged the compassing, for the statute on which it is framed requires the expression and declaration of such compassing by overt acts, which are, therefore, part of the crime. The deliberate design must be proved by definite acts and deeds, which alone constitute what the law calls overt acts. But mere conspiring is not an overt act, it is no more than compassing, and the allegation of it as an overt act is but the repetition of the charge of the offence, without any overt act being alleged to support it. To treat conspiring as an overt act, when it is really nothing but a mere mental operation which is to be evidenced by overt acts, is to defeat the 7 & 8 Will. 3, c. 3, which renders it imperative to give evidence of overt acts, and forbids evidence of any act not properly laid in the indictment. Overt acts must be clearly and distinctly laid, or the count will be defective. No agreement existing in the minds of many different persons can be treated as an overt act; it is an internal process of their thoughts, not an external act and deed, and unless of the latter class it is not sufficient to support the charge laid in this indictment:—[THE LORD CHANCELLOR:—Does not agreement import consultation, and is not consultation among several persons an act—an overt act?] Not necessarily. There may be a common intention among

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several persons without there ever having been any actual consultation among them. What ought to have been alleged was the particular overt act by which the accused had become a party to the asserted conspiracy. There is no allegation of that sort here, and no one can be charged with treason without some act of treason being distinctly alleged against him. The third count fully justifies this argument, for there what is charged is the offence of compassing, intending, &c., to be proved by the subsequent allegation of overt acts. Now, that is actually the very matter that in the two preceding counts constitutes one of the pretended overt acts. It is clear, therefore, that the indictment itself treats the very same thing in two different and inconsistent ways. The conspiracy ought to be charged as a specific offence, for otherwise no particulars can be obtained of the acts which are supposed to constitute the conspiracy, and the humane intentions of the law may thus be defeated.

The allegation of a specific act being done on a particular day, and on divers other days, is uncertain and bad. The indictment is bad on the ground of duplicity: several overt acts are alleged in each count, and several overt acts of distinct character, and which, with the alleged compassings, constitute different species of felony, are alleged in one count. The indictment is, therefore, defective in substance, and the judgment on it cannot be supported: *Gabbett* on the Criminal Law (1); *Vaughan's Case* (2); *Reg.* v. *Duffy* (3); *Reg.* v. *Parker* (4); *Watson's Case* (5); *Hawkins* (6); *Archbold's* Pleading and Evidence (7).

If any part of a count is bad, a general judgment on it cannot be sustained: *O'Connell* v. *The Queen* (8).

The judgment on the demurrer here was bad in form.

The allegation in the caption that the indictment was found by persons who were "sworn and affirmed," is not sufficient. It ought to be stated who were sworn and who were affirmed, that it might be known that these things were rightly done.

(1) Book I. c. li. p. 890, where 3 Inst. 12; 1 Hale, P. C. 108–149; Fost. 194; and East, P. C. 116, are referred to.

(2) 13 St. Tr. 485; Fost. 246; East, P. C. 123.

(3) 4 Cox, Cr. C. 294.

(4) 1 Car. & Marsh. 639.

(5) 32 St. Tr. 5.

(6) Vol. ii. c. 25, s. 59 & s. 77.

(7) Tit. Indictment.

(8) 11 Cl. & F. 155.

Then as to the jurors by whom the case was tried, the 3 & 4 Will. 4, c. 91, clearly required an annual revision of the jury list, and the object was, as the statute declared, to make a list for each separate year. Persons who were not on the list for a particular year were not competent to sit as jurymen merely because they had been on the list in the previous year. As soon as the year ceased the authority of the list ceased, and the only persons competent to serve were those who were on the list which came into force on the 1st of January in each year. The words of the 9th section of the statute are precise on this point. They declare that "such jurors' book shall be brought into use on the 1st day of January after it shall be so delivered to the sheriff, and shall be used for one year next following." The 11th section enforces this limitation as to time by directing that the sheriff shall not return to any precept the names of any persons not on the jurors' book for the current year; and the proviso that if there shall be no jurors' book for the current year the book for the previous year may be used, shews distinctly that if there is such a book—and there was such a book here—the jurors must come from that book and from that book alone. Each person ceases to be qualified to act as a juror when his name ceases to be on the book for the current year. It may be admitted that if the trial had commenced in 1865 and been continued into 1866, a juror once sworn to try would not have become incompetent by his name not appearing on the book for 1866: but that was not the case here. The trial did not begin till 1866. The counterplea, that the proceedings under the special commission began in 1865 and were carried on by continuances till 1866, is no answer to this objection. Nor can it be admitted, for it contradicts the record which states the proceedings on the 19th of January, 1866, and says that the sheriff was then ordered to cause immediately the jury to come, and that thereupon the sheriff returned the panel, and the jurors "here returned, being called, thereupon came." These entries shew that the jurors were persons called in 1866, and who, therefore, ought to have been upon the jurors' book of that year.

Then as to the case of *James Booth*. The qualification settled by the statute is "every man between the ages of twenty-one years and of sixty years." If a man is of any other age he does not

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possess the qualification required by the statute, and consequently is not entitled to be on the jurors' book, and therefore not entitled to sit as a juryman. If the Act had said that every man possessed of a certain amount of money, or of landed property, should be qualified, no one would have doubted that if he did not possess one or the other he would not be qualified. The words of the Act here were that every man of a certain age should be qualified, which was equivalent to saying that every man of any other age than that specified, whether below it or above it, should not be deemed qualified. The words of the Act here prevented the fact of greater age being treated as an exemption; it was a disqualification, for age is as much part of the qualification as any other thing. He ought not to be returned on the panel, and he ought to be discharged. The question being only on the words of the statutes, no authorities can be cited upon it.

The *Attorney-General* (Sir *J. B. Karslake*), and Mr. *Hannen*, for the Crown, were not called on.

THE LORD CHANCELLOR proposed that the following questions should be put to the Judges:—

1. Ought the challenge to *James Booth* upon the ground of age to have been allowed?

2. Ought the challenge to the array, or that to *Henry Fry*, upon the ground of not being in the jurors' book for 1866, to have been allowed?

3. Is the indictment open to objection by reason of the manner in which the same alleges the matters, acts, and deeds by which the compassings, imaginations, devices, or intentions are therein mentioned to have been expressed, uttered, or declared, or by reason of any other error alleged to appear in the record?

4. Ought judgment to have been given upon the whole record, or any part thereof, for the Plaintiff in Error?

The Judges requested time to answer these questions.

July 3. Mr. JUSTICE WILLES delivered the opinion of the Judges:—

My Lords, 1. In answer to the first question, the Judges are of

opinion that the challenge to *James Booth* upon the ground of age ought not to have been allowed.

2. Infancy has been considered a ground of disqualification on account of probable deficiency of understanding (*propter defectum*): *Comyn's* Digest (1). Being over the prescribed age has been considered only a ground for not returning the juryman, and there is no known head of *challenge* (certainly not that *propter defectum*) under which objection can be made to a juryman over the prescribed age, if otherwise competent. The *Statute of Westminster* 2, 13 Edw. 1, c. 38, in terms prohibited putting (amongst others) men over seventy upon the panel; yet if any were returned contrary to the purview of the Act he could not be challenged, neither could the juryman allege the matter for his discharge (as of right), but was put to his action (2): *Comyn's* Digest (3).

3. A like construction ought to be put upon the present *Jury Act*. The 20th section of 3 Will. 4, c. 91, does not profess to give any new right of challenge in respect of non-liability, but only preserves such right in respect of "want of qualification" under the Act. Is, then, the personal quality of being over sixty a want of qualification, or only a personal ground of exemption? It should seem the latter. The statute, being in the affirmative, leaves infants disqualified as at the common law. Aliens (except as to juries *de medietate*), convicts of treason felony or infamous crime, and outlaws, are specially disqualified by sect. 3. Persons of certain rank and occupation, some of whom were liable to challenge at the common law, and still remain so, as peers *propter dignitatem*, *Comyn's* Digest (1), are exempted by the 2nd section. Persons of sixty and upwards are, by the first section, forbidden to be returned by the sheriff in words no more stringent than those of the *Statute of Westminster*, which were held not to disqualify, or even exempt, after return made. And the enactment dealing in terms with qualification as "qualification in respect of property" is, in effect, that persons qualified as to property, &c., shall if under sixty be liable to serve, and if over sixty shall be not disqualified, but for their age sake relieved in the manner specified. The challenge to *James Booth* was, therefore, rightly overruled.

(1) Challenge, C. 2. (2) 2 Institute, 448.
(3) Challenge, A. 4.

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4. As to the second question, the Judges are of opinion that neither the challenge to the array, nor that to *Henry Fry* upon the ground of not being in the jurors' book for 1866, ought to have been allowed.

5. The proceedings were, under a special commission, lawfully instituted in the year 1865, the panel, including *Henry Fry*, was regularly returned in that year from the book of that year, and the proceedings were duly continued up to the occasion when the challenge was made. No objection was made to *Henry Fry* upon the ground of want of qualification, or otherwise than that he was not upon the jurors' book of the year in which the trial took place. He was a competent juror duly returned to serve at and during the commission. The question, therefore, is, whether at a commission begun in one year and finished in the next, the jury must be changed so soon as the book for the next year is delivered to the sheriff. This might be requisite if the Act forbade a juror duly summoned to serve after the delivery of the new book to the sheriff, but the Act (sect. 11), in terms only forbids the sheriff "in answer to any writ of *venire facias*, or precept for the return of jurors, to return the names of any persons not contained in the jurors' books for the *then* current year."

6. Assuming, therefore, that this sort of objection by way of challenge either to the array or the poll is competent in any case it was unfounded in this.

7. In answer to the third question, the Judges are of opinion that the indictment is not open to objection by reason of the manner in which it alleges the matters, acts, and deeds by which the compassings, imaginations, devices, or intentions are therein mentioned to have been expressed, uttered, or declared, or by reason of any other error alleged to appear in the record.

8. The main point of this question is, whether a conspiracy to do an unlawful act in promotion of a felonious design can be a sufficient "overt act" to express that design within the 11 Vict. c. 12. The first count and the first overt act sufficiently raise that question.

9. The first count states that the Plaintiff in Error, and others named, did feloniously "compass, imagine, invent, devise, and intend to deprive and depose our Lady the Queen of her crown."

The first overt act alleged as expressing that design is, that in "order to fulfil that felonious compassing," and so forth, they afterwards "feloniously did combine, conspire, confederate, and agree," with certain other persons, named, and others unknown, to raise, make, and levy insurrection and rebellion against our Lady the Queen within this realm.

10. The argument was, that a conspiracy rests in intention only, that the law distinguishes between acts intended and acts done; and that an overt act, to satisfy the statute, must consist in either publishing or printing some writing, or in some bodily act or deed, such as procuring arms.

11. So far as this question depends upon the bare construction of the statute, it appears to admit of no doubt. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means. And so far as proof goes, conspiracy, as *Grose*, J. said in *Rex* v. *Brissac* (1), is generally "matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them." The number and the compact give weight and cause danger, and this is more especially the case in a conspiracy like those charged in this indictment. Indeed, it seems a reduction to absurdity, that procuring a single stand of arms should be a sufficient overt act to make the disloyal design indictable, and that conspiring with a thousand men to enlist should not.

12. The history of the statute also points clearly to the conclusion that a conspiracy is a sufficient overt act, and, indeed, seems to shew that the language of the Act, following that of 36 Geo. 3, c. 7, was framed to confirm, and even extend, the decisions upon the construction of *Statute of Treasons*, and to preclude all such questions for the future.

13. By the statute of 25 Edw. 3, st. 5, c. 2 (extended to

(1) 4 East, 171.

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Ireland by *Poyning's Act*, see *O'Brien* v. *The Queen* (1), it was declared to be treason "when a man doth compass or imagine the death of our Lord the King," &c., "or if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies, in his realm or elsewhere, and thereof be probably attainted of open deed." It was this distinction, made in terms, between compassing the King's death and actually making war, that caused the difficulty which was removed by one class of the decisions as to constructive treason. "In this famous statute," says Mr. *Hallam* (2), "we find it only declared treasonable to compass or imagine the King's death, while no project of rebellion appears to fall within the letter of its enactments, unless it ripen into a subsequent act of levying war."

14. The difficulty did not depend upon any distinction such as was suggested in argument between conspiring and consulting. It was not that a conspiracy was not an act, and could not be an overt act, but that a mere conspiracy to do, or any other motion towards but stopping short of doing, an act, the doing of which, and not the mere compassing of it, was, by the letter of the act, treasonable, could not properly be alleged as an overt act of treason; for instance, the alleging a conspiracy to levy war, which the *Statute of Treason* did not in terms make treason, as an overt act of compassing the King's death, which it did make treason. Mr. *Hallam*, whilst he strenuously criticises the decisions upon this subject, truly states, that notwithstanding the opinion of Lord *Coke*, and the hesitation of Lord *Hale*, "without adverting to the more extravagant convictions under this statute in some violent reigns, it gradually became an established doctrine with lawyers that a conspiracy to levy war against the King's person, though not in itself a distinct treason, may be given in evidence as an overt act of compassing his death." He goes on to state his opinion that there was "still less pretext for applying the same construction to schemes of insurrection when the royal person is not directly the object of attack, and when no circumstance indicates any hostile intention towards his safety," but he shews that this application of the statute was adopted before and confirmed after the Revolution, and that it has been repeatedly laid down

(1) 2 H. L. C. 465. (2) 3 Const. Hist. 206.

from the Bench in subsequent proceedings for treason, as well as in treatises of very great authority. It has, therefore, as he allows, "all the weight of established precedent."

15. The law to this effect is laid down as established in *Foster* (1) and *Blackstone* (2), and precedents are to be found in the books, from *Tremaine* downwards, referred to in *Chitty's* Criminal Law (3). The authorities are collected in the elaborate judgment delivered in this case by Lord Chief Justice *Whiteside* in the Court of Queen's Bench (4).

16. But whatever doubt may have originally existed as to this construction of the *Statute of Treasons*, was removed by the Act of 36 Geo. 3, c. 7 (made perpetual by 57 Geo. 3, c. 61), which enacts that "if any person or persons whatsoever shall, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the same our Sovereign Lord the King, his heirs and successors, *or* to deprive or depose him or them from the style, honour, or kingly name of the imperial crown of this realm, or of any other of His Majesty's dominions or countries, *or* to levy war against His Majesty, his heirs and successors, within this realm, in order, by force or constraint, to compel him or them to change his or their measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe both Houses or either House of Parliament, *or* to move or stir any foreigner or stranger with force to invade this realm or any other His Majesty's dominions or countries under the obeisance of His Majesty, his heirs or successors; and such compassings, imaginations, and inventions, devices, and intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed, being legally convicted thereof upon the oaths of two lawful and credible witnesses, shall be adjudged a traitor."

17. That statute, making treasonable the mere compassing, &c. of any one of the acts enumerated, did, in terms, sanction and embody the received interpretation of the *Statute of Treasons*, with which, it must be presumed, that the Legislature was acquainted,

(1) Cr. Law, pp. 194, 195.
(2) 4 Comm. 79, 82.
(3) Vol. ii. p. 67a, and (n.)
(4) Ir. Law Rep. 1 Q. B. 12.

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and which it left undisturbed. Accordingly, after that statute, a proved conspiracy (not every conspiring, for to hold that is out of all question), but any conspiracy (like those here charged) naturally tending in fact, and intended to bring about and execute any of those designs which, whether executed or not, the statute enacts shall be treasonable if expressed by any overt act, was, unless a conspiracy could be held not to be an act, which would be strange, an overt act of such design.

18. And if this be the true construction of the 36 Geo. 3, c. 7, read by the light of the previous decisions, in the direction of which it extended the law, equally must it be the true construction of 11 Vict. c. 12, which, reciting the Act of Geo. 3, by the 1st section repealed it except as to offences against the person of the Sovereign, and by the 3rd section re-enacted it with a modification as to the character of the offence, which modification does not affect the present question. The result is, that the judicial construction of the Statutes of Treason has been adopted by the Legislature, making, however, many of the offences which they included, felonies under the Act 11 Vict. c. 12, but with the proviso (sect. 6) that nothing therein contained shall lessen the force of, or in anywise affect, anything enacted by the 25 Edw. 3, and (sect. 7) that proof of treason shall not defeat the charge of felony; so that in cases of positive proved design to overthrow the Queen's government by armed force, there is, it seems, a choice of remedies.

19. For the construction of this later Statute which, unlike the *Statute of Treasons,* does contemplate as criminal the mere intention to bring about the evil designs thereby sought to be restrained, not only are the authorities and precedents founded upon the more limited language of the 25 Edw. 3, *à fortiori* applicable, but there may also be used the emphatic reasoning of Mr. *Hallam* to shew that that Act ought, in sound policy, to have provided for the cases to which judicial construction improperly, in his view, though undoubtedly, and, as we conceive, irrevocably, applied it: "In most other offences, the intention however manifest, the contrivance however deliberate, the attempt however casually rendered abortive, form so many degrees of malignity, or at least of mischief, which the jurisprudence of most countries, and none more than *England,* has been accustomed to distinguish from the

perpetrated action by awarding an inferior punishment, or even none at all. . . . . But those who conspire against the constituted government connect in their sanguine hope the assurance of impunity with the execution of their crime, and would justly deride the mockery of an accusation which could only be preferred against them when their banners were unfurled and their force arrayed. It is as reasonable, therefore, as it is conformable to the usages of every country, to place conspiracies against the sovereign power upon the footing of actual rebellion, and to crush those by the penalties of treason who, were the law to wait for their opportunity, might silence or pervert the law itself."

20. So much for the more substantial ground of objection. But it was also argued that, allowing conspiracy to be an overt act might prejudice the prisoner, first, in allowing of a statement so vague as to defeat the 8th section of the 7 & 8 Will. 3, c. 3, that "no evidence shall be admitted or given of any overt act that is not laid in the indictment;" and secondly, in that no particulars could be obtained, as it was alleged they might if the conspiracy was charged as a substantive offence.

21. Each of these latter objections is beside the question whether conspiracy can be laid as an overt act. If it can, it may be laid in the usual and appropriate form of pleading, which is more general in case of conspiracy to commit an offence than in stating the offence itself. And there can be no doubt, indeed it was scarcely denied, that if conspiracy can be an overt act, it is sufficiently alleged in point of form: *Reg.* v. *Blake* (1). As to the statute of Will. 3, it leaves the form of alleging overt acts untouched. It seems nothing more than declaratory, and so far as it alters the practice and procedure in treason, it has been rightly ruled not to apply to treason-felony under the Act 11 Vict. c. 12. Moreover, and this is the substantial answer to these objections, an indictment only states the legal character of the offence, and does not profess to furnish the details and particulars. These are supplied by the depositions, and the practice of informing the prisoner or his counsel of any additional evidence not in the depositions, which it may be intended to produce at the trial. To make the indictment more particular, would only encourage formal objec-

(1) 6 Q. B. 126.

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tions upon the ground of variance, which have of late been justly discouraged by the Legislature.

22. As to the objection that the grand jurors are stated to have sworn and affirmed, without saying who affirmed, and upon what grounds, it is not suggested that any person affirmed who ought to have sworn, or swore who ought to have affirmed; and until the contrary appears, credit must be given to the Court for having properly ordered its proceedings.

23. The objection as to the averment of time in the tenth overt act of the first count, and other like overt Acts, if it exist in fact, is cured by statute 14 & 15 Vict. c. 100, s. 24.

24. The objection upon the ground of duplicity was founded upon the argument, not simply that several overt acts were alleged in each count, but also that several overt acts of distinct characters, and constituting with the alleged compassings and imaginations different species of felony, are alleged in one count. To this we answer that duplicity was not at common law an objection to a count upon the ground of including several demands (witness the common counts), but only when the count claimed the same thing upon several independent grounds, each sufficient, as in the case of *quare impedit* setting up several presentations, or in an action upon a bond at the common law, with several breaches of condition assigned. The objection, that a count was double for containing several causes of action, did not hold good: *Shepherd* v. *Shepherd* (1), and even if we were of opinion, which we are not, that several felonies are charged in each count by reason of the averment of several distinct modes of expressing, uttering, and declaring the compassings, imaginations, devices, or intentions therein mentioned, and that each of those felonies consists of compassing, imagination, device, or intention expressed, uttered, or declared, either by publishing any printing or writing, or by any other overt act or deed, or by all or some such means, that course of proceeding would nevertheless be justified by the enactment in sect. 5 of 11 & 12 Vict. c. 12, that "it shall be lawful in any indictment for any felony under this Act to charge against the offender any number of the matters, acts, or deeds by which such compassings, imaginations, inventions, devices, or intentions as aforesaid, or any

(1) 1 C. B. 849.

of them, shall have been expressed, uttered, or declared." And this is not only in harmony with the law that one treason may be alleged as an overt act of another treason, but also with the common sense of the matter, by which the offence, in whatever variety of expression it may declare itself, is in fact one course of active disloyalty, each stage of which reflects light upon what went before, and but adds to the evidence of the crime.

25. In order to prevent misapprehension, it may be proper to add that in the view which the Judges take that the overt acts objected to were all properly laid, it is unnecessary to express any opinion as to whether alleged overt acts may be separately demurred to, though we do not doubt that one good overt act would sustain the judgment, nor need we say whether the judgment against the Plaintiff in Error upon the demurrer ought to have been final according to *Reg.* v. *Faderman* (1), overruling many *dicta*, and amongst others *Reg.* v. *Duffy* (2). Probably, neither the form of the demurrer nor that of the joinder ought to affect the judgment of the Court, and a demurrer in abatement for matter in bar is to us a novelty. The Plaintiff in Error, however, cannot complain of the course taken in allowing him to plead over, and it was substantially correct if regarded, in what perhaps is the proper view to take of it, as an amendment allowed to the Plaintiff in Error before final judgment, notwithstanding the failure of his demurrer; a course within the competence of the Court, though it seems it ought to have swept away the demurrer and the proceedings thereupon, and simply substituted the plea of not guilty.

26. These latter points, however, do not require farther investigation, because, for the reasons already stated, the Judges are of opinion, in answer to the last question put to them by this House,

(1) 1 Dea. Cr. C. 569. The Judges there held that judgment on a *general* demurrer ought to be final against the prisoner, "inasmuch as, being a *general* demurrer, the prisoner confesses all the material facts charged against him in the indictment, though in the case of a demurrer of a special nature, which is usually called a demurrer in abatement, it might be otherwise. And they intimated that the various *dicta* which appeared in the books in opposition to the above ruling were probably to be accounted for by the above distinction not having been sufficiently attended to." This note was communicated to Mr. *Denison* by Mr. Baron *Alderson*, who was one of the Judges.

(2) 4 Cox, Cr. C. 294.

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that judgment ought not to have been given upon the whole record, or any part thereof, for the Plaintiff in Error.

July 10. THE LORD CHANCELLOR (Lord *Cairns*) :—

My Lords, in this case your Lordships have now had the opportunity of considering the opinion which has been delivered to the House by Her Majesty's Judges on this writ of error. The points which were argued before your Lordships were substantially three. The first question was, whether the challenge to one of the jurors, on account of age, was a sufficient and proper challenge? The second was, whether a challenge to another juror, and also a challenge to the array, on the ground that the jurors had not been returned in the sheriff's book of 1866, but had been returned in the sheriff's book of 1865, when the sittings of the commission commenced, was a challenge which ought to have been allowed? And the third question was, whether the indictment was properly framed, more particularly as regards the manner in which the overt acts were laid in the several counts of the indictment?

My Lords, at the conclusion of the argument, I think that upon none of these points did your Lordships entertain any grave or serious doubt—but you thought it desirable that the opinion of the learned Judges should be solicited upon them. That opinion, my Lords, I take the liberty of saying, appears to me to be most clear and satisfactory, and to be entirely in accordance with the views entertained by your Lordships at the close of the argument. I should be unwilling to add anything to what has been so clearly and lucidly expressed by the Judges; and, for my own part, I desire to say that I concur entirely in the opinion they have expressed and in the reasons they have given for that opinion. And I accordingly move your Lordships that this appeal be dismissed, and that the judgment of the Court of Queen's Bench in Ireland be affirmed.

LORD CRANWORTH :—

My Lords, I entirely concur with my noble and learned friend; and I do not know that I could at all usefully occupy your Lordships' time by adding a single word.

LORD CHELMSFORD:—

My Lords, the answers of the learned Judges upon every question submitted to them by your Lordships are so full and satisfactory, that, agreeing with them as I do, it seems hardly necessary to add anything to their unanimous opinion. But I desire shortly to state the grounds upon which I have arrived at the same conclusions with them.

As to the challenge to *James Booth* on account of age. Although this objection must be decided upon the words of the Act of Parliament, and if they absolutely disqualify, nothing more can be said; yet it is useful to consider what the law was before the Act, as it may throw some light upon any ambiguity which it may contain. The *Statute of Westminster* 2, 13 Edw. 1, c. 38, enacts in the most peremptory terms, that old men above the age of seventy shall not be put upon juries. Nevertheless, it seems clear that if a person over this age was placed by the sheriff upon the panel, he could not be challenged. The prohibition in the *Statute of Westminster* was therefore not intended as a disqualification, but merely as an exemption. If it amounted to a disqualification, *Rolle*, C.J., ought at once to have discharged the person of the age of seventy-two summoned upon the jury in the case mentioned in the note to *Viner's* Abridgment (1), and I think he ought to have allowed the old man to claim his exemption, for he was not liable to serve, though the sheriff had chosen to return him upon the panel.

Turning to the Act by which this question must be decided, the 1st section commences with a prohibition to the sheriff against returning the names of any persons not qualified to serve on juries according to the provisions of the Act. The section then assumes a directory form, and enacts that every man between the ages of twenty-one and sixty who shall have lands and tenements in a county, or houses and tenements in a city, town, or borough, of certain values, shall be qualified with respect to property, and shall be liable to serve on juries, &c.

The qualification is in respect of property, the liability is upon persons between the ages of twenty-one and sixty possessed of this

(1) 1 Trial, A. C. 2 (n. *), p. 208.

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property. Persons above the age of sixty who are qualified in respect of property are not liable to serve upon juries, although they are not disqualified from serving. It was unnecessary to mention persons above the age of sixty amongst those exempted under the 2nd section, because it was assumed that the sheriff would return those within the specified ages only, and therefore to them alone the exemptions would necessarily apply. The distinction between "qualification" and "liability" is kept up in different sections of the Act; by the 4th, directing the clerk of the peace to issue his precept to the collectors of grand jury cess to make out a list of men "qualified with respect to property, and liable to serve on juries;" and by the 7th, directing the mode in which the list is to be made out, and referring to the schedule for the form. By the 9th section the lists are to be produced at the quarter sessions, and if any man not qualified, or not liable, to serve on juries, is inserted in the list, the justices may remove him. Now, what would be the mode of dealing with these different classes of objections to a person's name remaining on the list? In the one case it would be urged that the person was not qualified in respect of property; in the other, that he was not liable on account of age. The one objection would come under the head of want of qualification, the other under the claim of exemption. I entertain no doubt that the age of *James Booth* was no ground of challenge.

With respect to the challenge to the array, or to *Henry Fry* on account of his not being on the juror's book for 1866, I am quite clear that it was properly disallowed. The Act of the 3 & 4 Will. 4, c. 91, contains provisions for making out jury lists annually, which are to be copied into a book, called the jurors' book, by the clerks of the peace, and delivered to the sheriff, who, on quitting office, is to deliver the same to the succeeding sheriff. And it is enacted, "that every jurors' book so prepared shall be brought into use on the 1st day of January after it shall be so delivered by the clerk of the peace to the sheriff, and shall be used for one year next following." The 11th section of the Act enacts, "that the sheriff shall not, in answer to any writ of *venire facias*, or precept for the return of jurors, return the names of any persons not contained in the jurors' book for the then current year."

The Special Commission of Oyer and Terminer and General Jail Delivery was issued on the 30th of October, 1865; and the session was held on the 27th of November following, and continued by adjournment to the 19th of January, 1866, when the Plaintiff in Error was tried and convicted. The name of *Henry Fry* was in the jurors' book for the year 1865, but was not in that for the year 1866. It appears by the record in the counter-plea, put in by the Attorney-General, to the challenge to the array, that the precept whereby the sheriff was commanded to return the panel of jurors, was issued on the 6th of November, 1865, and the sheriff was therefore bound by the Act of the 3 & 4 Will. 4, in obedience to that precept, to return the names of persons on the jurors' book for that year. The jury, then, being lawfully summoned, did it cease to be the proper jury to try the Plaintiff in Error because, before the trial took place, a new jurors' book had been brought into use? It was admitted by the counsel for the Plaintiff in Error, that if the trial had commenced in 1865, and had continued into the year 1866, *Henry Fry* would not have been incompetent to act as a juror; but I do not see what difference there could have been between his being disqualified at the commencement of the trial and his becoming so in the course of it. The argument of the Plaintiff in Error requires not only that a fresh panel of jurors should be returned by the sheriff, but that a new precept should be issued by the Judges. For as long as the precept of the 6th of November, 1865, continued, the only return which the sheriff could possibly make to it, under the Act, was of the names of persons contained in the jurors' book for the then current year. There was, therefore, not the least foundation for a challenge, either to the array or to the poll, upon this ground.

The remaining question is upon the objection to the manner in which the overt acts are alleged in the indictment. The Act of Parliament on which the indictment is founded enacts, that if any person shall compass, imagine, invent, devise, or intend to deprive or depose the Queen from the style, honour, or royal name of the Imperial crown, or to levy war against Her Majesty, or to move or stir any foreigner with force to invade the kingdom, and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or

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writing, or by any overt act or deed, every person so offending shall be guilty of felony."

The first count of the indictment (which it will be sufficient to refer to in order to raise the question) charges that the Plaintiff in Error did feloniously compass, imagine, invent, devise, and intend to deprive and depose our Lady the Queen of her crown; and the overt act alleged is that in order to fulfil that felonious compassing, &c., they afterwards feloniously did combine, conspire, confederate, and agree with certain other persons named, and others unknown, to raise, make, and levy insurrection and rebellion against our Lady the Queen within this realm. The Plaintiff in Error demurred to the indictment on the ground that "the several overt acts and deeds are not, nor is any of them, set out or stated with singleness or certainty, or with proper or necessary averments required by law."

It was argued for the Plaintiff in Error that a conspiracy to do an act in order to fulfil the alleged compassing to depose the Queen was not, in itself, an overt act within the meaning of the statute; and also that the overt act alleged was itself a substantive act of felony, and therefore could not be alleged as proof of the felony charged in the indictment.

It is too late to argue that a conspiracy may not be an overt act of treason. There are many authorities which establish that it is a sufficient allegation in an indictment for this offence, all of which are collected in the judgment of the Lord Chief Justice of the Queen's Bench in *Ireland* in this case. It is a mistake to say that conspiracy rests in intention only. It cannot exist without the consent of two or more persons, and their agreement is an act in advancement of the intention which each of them has conceived in his mind. The argument confounds the secret arrangement of the conspirators amongst themselves with the secret intention which each must have previously had in his own mind, and which did not issue in act until it displayed itself by mutual consultation and agreement.

I confess that I am unable to appreciate the argument which denies the right to prove one of the statutory felonies by an overt act which amounts to another. Suppose there is no other act by which the felony charged can be proved, can it be said that the

offender must escape altogether on account of the impossibility of alleging his offence without stating his commission of an act which might itself have been the subject of an indictment? It appears to me that the mere statement of the argument is an answer to it.

With respect to the other points upon which the general question depends, whether judgment ought to have been given upon the whole record or any part thereof for the Plaintiff in Error, they are sufficiently adverted to for the purpose of the writ of error by the learned Judges. I would merely observe that upon the question whether alleged overt acts may be separately demurred to, their observation that one good overt act (meaning, of course, in each count) would support the judgment appears to me decisive of the question. I have always understood that a demurrer must be to the entire count or plea, and not to part of it; and if it is good upon the whole, anything else which it contains which, by itself, would be insufficient is mere surplusage.

I am of opinion that upon the whole record the judgment was rightly given for the Crown.

LORD COLONSAY:—

My Lords, I have nothing to add to the opinion which has been so fully stated by the learned Judges in this case, in which I entirely concur, as well as in the observations which have been made by my noble and learned friends.

Judgment of the Court of Queen's Bench in Ireland affirmed.

Lords' Journals, 10th July, 1868.

Attorney for Plaintiff in Error: *J. Lawless, Dublin.*
Attorneys for the Crown: *The Solicitors for the Treasury.*

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July 6, 7, 17.

JOHN RYLANDS AND JEHU HORROCKS . . { PLAINTIFFS IN ERROR;

AND

THOMAS FLETCHER . . . . . { DEFENDANT IN ERROR.

Mine—Negligence—Use of own Property—Water.

Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages.

But if he brings upon his land any thing which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned.

A. was the lessee of mines. *B.* was the owner of a mill standing on land adjoining that under which the mines were worked. *B.* desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to construct it. *A.* had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages and flooded *A.*'s mine:—

Held, that *A.* was entitled to recover damages from *B.* in respect of this injury.

THIS was a proceeding in Error against a judgment of the Exchequer Chamber, which had reversed a previous judgment of the Court of Exchequer.

In November, 1861, *Fletcher* brought an action against *Ryland & Horrocks*, to recover damages for an injury caused to his mines by water overflowing into them from a reservoir which the Defendants had constructed. The declaration contained three counts, and each count alleged negligence on the part of the Defendants, but in this House the case was ultimately treated upon the principle of determining the relative rights of the parties independently of any question of personal negligence by the Defendants in the exercise of them.

The cause came on for trial at the *Liverpool* Summer Assizes of

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1862, when it was referred to an arbitrator, who was afterwards directed, instead of making an award, to prepare a special case for the consideration of the Judges. This was done, and the case was argued in the Court of Exchequer in Trinity Term, 1865.

The material facts of the case were these:—The Plaintiff was the lessee of certain coal mines known as the *Red House Colliery*, under the Earl of *Wilton*. He had also obtained from two other persons, Mr *Hulton* and Mr. *Whitehead*, leave to work for coal under their lands. The positions of the various properties were these:—There was a turnpike road leading from *Bury* to *Bolton*, which formed a southern boundary to the properties of these different persons. A parish road, called the *Old Wood Lane*, formed their northern boundary. These roads might be described as forming two sides of a square, of which the other two sides were formed by the lands of Mr. *Whitehead* on the east and Lord *Wilton* on the west. The Defendants' grounds lay along the turnpike road, or southern boundary, stretching from its centre westward. On these grounds were a mill and a small old reservoir. The proper grounds of the *Red House Colliery* also lay, in part, along the southern boundary, stretching from its centre eastward. Immediately north of the Defendants' land lay the land of Mr. *Hulton*, and still farther north that of Lord *Wilton*. On this land of Lord *Wilton* the Defendants, in 1860, constructed (with his Lordship's permission) a new reservoir, the water from which would pass almost in a southerly direction across a part of the land of Lord *Wilton* and the land of Mr. *Hulton*, and so reach the Defendant's mill. The line of direction from this new reservoir to the *Red Colliery* mine was nearly south-east.

The Plaintiff, under his lease from Lord *Wilton*, and under his agreements with Messrs. *Hulton* and *Whitehead*, worked the mines under their respective lands. In the course of doing so, he came upon old shafts and passages of mines formerly worked, but of which the workings had long ceased; the origin and the existence of these shafts and passages were unknown. The shafts were vertical, the passages horizontal, and the former especially seemed filled with marl and rubbish. Defendants employed for the purpose of constructing their new reservoir persons who were admitted to be competent as engineers and contractors to perform the work,

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and there was no charge of negligence made against the Defendants personally. But in the course of excavating the bed of the new reservoir, five old shafts, running vertically downwards, were met with in the portion of the land selected for its site. The case found that "on the part of the Defendants there was no personal negligence or default whatever in or about, or in relation to, the selection of the said site, or in or about the planning or construction of the said reservoir; but, in point of fact, reasonable and proper care and skill were not exercised by, or on the part of, the persons so employed by them, with reference to the shafts so met with as aforesaid, to provide for the sufficiency of the said reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear."

The reservoir was completed at the beginning of December, 1860, and on the morning of the 11th of that month the reservoir, being then partially filled with water, one of the aforesaid vertical shafts gave way, and burst downwards, in consequence of which the water of the reservoir flowed into the old passages and coal-workings underneath, and by means of the underground communications then existing between them and the Plaintiff's workings in the *Red House Colliery*, the colliery was flooded and the workings thereof stopped.

The question for the opinion of the Court was whether the Plaintiff was entitled to recover damages by reason of the matters hereinbefore stated. The Court of Exchequer, Mr. Baron *Bramwell* dissenting, gave judgment for the Defendants (1). That judgment was afterwards reversed in the Court of Exchequer Chamber (2). The case was then brought on Error to this House.

Sir *R. Palmer*, Q.C., and Mr. *T. Jones*, Q.C., for the Defendants (now Plaintiffs in Error):—

In considering this case it is important to remember that the communications between the workings of the Plaintiff and the old shafts and pits were not known to the Defendants. The question, therefore, is, whether they can be held responsible for an injury which, as the possible cause of it was unknown to them, they could not by any care on their part prevent. It is submitted that they

(1) 3 H. & C. 774. (2) 4 Ibid. 263; Law Rep. 1 Ex. 265.

are not liable. Every man has a right to use his own land for lawful purposes, and if he does so, and does so without knowledge that he will thereby occasion injury to another, he cannot be held responsible should injury occur. For that is a case which comes within the legal description of *damnum absque injuriâ*. The principle adopted by the Exchequer Chamber here, that though a man uses his lawful rights without malice and without knowledge of danger, he may still be liable for any mischief occurring from such use, is too wide. It would make every man responsible for every mischief he occasioned, however involuntarily, or even unconsciously. Now knowledge of possible mischief is of the very essence of the liability incurred by occasioning it: *Acton* v. *Blundell* (1); *Chasemore* v. *Richards* (2). That has always been recognised as one of the principles of our law, and has, as such, been adopted by the Courts in *America*: *Pixley* v. *Clark* (3). *Smith* v. *Kenrick* (4) shewed that where two rivers lay contiguous to each other, but neither was subject to a servitude to the other, each owner had a right to work

(1) 12 M. & W. 324.

(2) 7 H. L. C. 349. 5 Jur. N.S. 873

(3) 32 Barbour's Reports (*New York*). The head-note of the case is as follows:—"Individuals owning the bed of a stream, and each bank thereof, have the right to build a dam and embankment, and raise the water of the stream as high as they please, subject only to the restriction resting upon all, so to enjoy their own property as not to injure that of another person, with the qualifications and limitations incident to that right of property.

"And if they, in the exercise of that right, build with due care an embankment to prevent the water, when raised by their dam above the natural banks of the stream, from overflowing the lands of adjacent owners, and in consequence of raising their dam the water finds its way through their own natural soil and below the surface thereof, by filtration, percolation, or otherwise, to the land of an adjacent proprietor, the owners of such dam and embankment are not, in the absence of any unskilfulness, negligence, or malice, liable to such adjacent proprietor for any damage he may sustain thereby; the injury being *damnum absque injuriâ*.

"A party is liable for any defect in his artificial erections which might have been remedied by reasonable care and skill, but not for any defect in the natural banks of a stream.

"Where persons have the right to use the waters of a stream for manufacturing purposes, the right to dam the water and detain it a reasonable time follows as a necessary incident to the right of user; and they cannot be compelled to make an artificial reservoir for that purpose.

"The banks of the stream are theirs for that purpose; and so long as the water is only nominally detained for this lawful, customary, and proper purpose, the adjacent landowners must submit to the indirect and consequential damages resulting to their lands from such use."

(4) 7 C. B. 515.

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his own mine in the best way for his own benefit, and, if he did so without negligence, was not liable to the other for prejudice to his property which might thereby arise. That case is very important, for there knowledge existed which it is not pretended existed here. In the time of *Bracton* the rule existed that injury created to one man by the lawful act of another, if that act was done without wilfulness or negligence, would not afford a title to a claim of damages (1). That must be the rule in the present day, for otherwise no man could use his property, however carefully, without being liable to pay damages for mischief which, without any fault or even any knowledge of his own, might afterwards occur. *Chadwick* v. *Trower* (2) gives the answer to that proposition. There it was held that a man who pulled down his own wall was not bound to give notice to his neighbour of his intention to do so, and was not liable to that neighbour in damages merely because, in pulling it down, he damaged an underground wall of his neighbour's, of the existence of which he had no knowledge. That case, so far as principle is concerned, exactly resembles the present. *Tenant* v. *Goldwin* (3) does not affect the Defendants here, for there all the facts were fully known to both parties, and the Court merely decided that, that being so, the Defendant was bound to keep his own property in such a state that it should not injure his neighbour. *Bagnall* v. *The North Western Railway Company* (4) at first sight appears much nearer the present case; but there all the facts as to the condition of the soil and the parts worked through were known, and in that respect, therefore, the difference between the two cases is complete. The want of knowledge here is an essential ingredient in the case. The principle laid down by Mr. Baron *Bramwell* in this case, that a man in the use of his own property must take care that he does not injure that of his neighbour, is true in itself, but cannot be applied to a case like the present, where the injury which happens is merely consequential, and is the result of circumstances as to which neither knowledge of them, nor negligence in providing against them, can be imputable to the Defendants. Indeed, the fault, if any, is with the Plaintiff. He began the work in his mines some years ago, and in the

(1) Bract. bk. 4, c. 37, fol. 221.
(2) 6 Bing. N. C. 1.
(3) 1 Salk. 360; 2 Ld. Raym. 1089.
(4) 7 H. & N. 423; 1 H. & C. 544.

progress of it he came to know of these passages. He ought to ave communicated his knowledge of them to the Defendants, who might then have provided against this mischief, but he did not. The obligation to give notice of the circumstances, if they were to be relied on as creating any liability in another party, was recognised in *Partridge* v. *Scott* (1). Here, too, the Defendants employed competent persons to do something which was in itself perfectly lawful, and they cannot be held liable in damages without clear evidence of impropriety or negligence on their own parts. The person who actually does the work is alone liable: *Baker* v. *Hunter* (2); *Richards* v. *Hayward* (3); *Peachey* v. *Rowland* (4); *Allen* v. *Hayward* (5). *Sutton* v. *Clarke* (6) is clearly in favour of the Defendants. No pretence for setting up this charge of neglect was suggested in this case. On the facts, therefore, as well as on the principles of law, the judgment against the Defendants cannot be supported.

Mr. *Manisty*, Q.C., and Mr. *J. A. Russell*, Q.C., for the Plaintiff below (now the Defendant in Error):—

The mines here were worked in the ordinary way, and their owner is entitled to be protected against a flow of water which destroyed his works, and which was occasioned by the act of others. If the water had come into his mine from natural causes alone, he could not have complained; but it came in through the act of the Defendants in making their reservoir. They introduced there water which would not have come there in a natural way, and they were therefore bound to see that it did not produce mischief to any one. They brought the mischief on the land, and they were bound to guard against the consequences. *Baird* v. *Williamson* (7) really disposes of this case, on the ground of the distinction between water flowing on to land, from natural gravitation, and water brought there through the act of an adjoining landowner. *Smith* v. *Kenrick* (8) had established that each of two mine owners might work his own mine in the ordinary and proper way, and that if, from such working, and without negligence on the part of the one, an injury was

(1) 3 M. & W. 220.
(2) 31 L. J. (Ex.) 214; 7 H. & N. 1.
(3) 2 Man. & G. 575.
(4) 13 C. B. 182.
(5) 7 Q. B. 960.
(6) 6 Taunt. 29.
(7) 15 C. B. (N. S.) 376.
(8) 7 C. B. 515.

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occasioned to the property of the other, the former was not liable. That proposition is not contested; but that case implied that if the injury was occasioned by something which was not ordinary working, the injury thereby occasioned would be the subject of a claim for damages. Here the construction of the reservoir was not an ordinary working of the property of the Defendants. *Baird* v. *Williamson* completed what *Smith* v. *Kenrick* had left deficient, and the two, taken together, established beyond all question the title of the Plaintiff here to recover damages. The case of *Sutton* v. *Clarke* (1) merely decided that a public functionary acting to the best of his judgment and without malice, and obtaining the best assistance he can, is not liable to a claim for damages if what he does operates to the prejudice of an individual. That case does not affect the present, except that it indirectly confirms the doctrine now contended for, namely, that though the act was in itself lawful, yet if the doing of it occasions an injury to any one, the person injured has a right of action. The principle that an injury, though only consequent on an act, and not developing itself till some years after the act done, may still be the subject of a claim for damages, was settled in *Backhouse* v. *Bonomi* (2), and there the act which occasioned the injury was in itself a lawful act, and there had been nothing but the mere ordinary working of the mines; yet, as it resulted in a mischief to the property of other people, it was held to be a subject for compensation. In *Hodgkinson* v. *Ennor* (3) the Defendant had polluted a stream by works on his own land, which works were not in themselves illegal, but they were not the natural mode of working the property, and they produced a mischief to his neighbour; he was therefore held responsible in damages. Lord Chief Justice *Cockburn* there said, that it was a case in which the maxim "*Sic utere tuo ut alienum non lædas*" applied; and Mr. Justice *Blackburn* declared "the law to be as in *Tenant* v. *Goldwin* (4), that you must not injure the property of your neighbour, and, consequently, if filth is created on any man's land, 'he whose dirt it is must keep it that it may not trespass.'" Making a shaft to mine a is, no doubt, a part of the proper and ordinary way of working mining property, but the shaft must be so made and

(1) 6 Taunt. 29.
(2) El. Bl. & El. 622; 9 H. L. C. 503.
(3) 4 B. & S. 229.
(4) 2 Ld. Raym. 1089; Salk. 360.

fenced that it shall not occasion injury to the property of others, and if not so made and kept, any injury thereby occasioned must be compensated. *Williams* v. *Groucott* (1), and *Imperial Gas Company* v. *Broadbent* (2), went altogether on that principle; so did *Bamford* v. *Turnley* (3), and *Tipping* v. *St. Helen's Smelting Company* (4).

As was said in *Lambert* v. *Bessey* (5), "if a man doeth a lawful act, yet if injury to another ariseth from it, the man who does the act shall be answerable;" and many illustrations of the principle are there given. Every one of them justifies the argument which seeks to fix liability on these Defendants.

The millowners are liable here, though they employed a competent engineer and contractor, and were not themselves guilty of any personal negligence. The principle, *qui facit per alium facit per se*, applies here, and the principal is liable for the negligence of his agent: *Paley* (6); *Pickard* v. *Smith* (7).

Mr. *T. Jones* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in this case the Plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The Defendants are the owners of a mill in his neighbourhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the Plaintiff, although, in point of fact, some intervening land lay between the two. Underneath the close of land of the Defendants on which they proposed to construct their reservoir there were certain old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the Plaintiff of his mine,

(1) 4 B. & S. 149. (4) 4 B. & S. 609; 11 H. L. C. 642.
(2) 7 H. L. C. 600. (5) Sir T. Raym. 421.
(3) 3 B. & S. 62. (6) Pr. & Ag. 262.
(7) 10 C. B. (N. S.) 470.

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he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the Defendants.

In that state of things the reservoir of the Defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally, the Defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my Lords, when the reservoir was constructed, and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the Defendants it passed on into the workings under the close of the Plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.

The Court of Exchequer, when the special case stating the facts to which I have referred, was argued, was of opinion that the Plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the Judges there unanimously arrived at the conclusion that there was a cause of action, and that the Plaintiff was entitled to damages.

7 Ex 311
L.R. 1 App Cas 99

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained

that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the Defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships, the case of *Smith* v. *Kenrick* in the Court of Common Pleas (1).

On the other hand if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable. As the case of *Smith* v. *Kenrick* is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same Court, the case of *Baird* v. *Williamson* (2), which was also cited in the argument at the Bar.

My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Mr. Justice *Blackburn* in his judgment, in the Court of Exchequer Chamber, where he states the opinion of that Court as to the law in these words: "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *primâ facie*

(1) 7 C. B. 515. (2) 15 C. B. (N. S.) 317.

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answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the Plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

My Lords, in that opinion, I must say I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CRANWORTH:—

My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice *Blackburn* in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

In considering whether a Defendant is liable to a Plaintiff for damage which the Plaintiff may have sustained, the question in general is not whether the Defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert* v. *Bessey*, reported by Sir *Thomas Raymond* (1). And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum*. This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two modern cases in the Court of Common Pleas referred to by my noble and learned friend. I allude to the two cases of *Smith* v. *Kenrick* (2), and *Baird* v. *Williamson* (3). In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The Defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the Plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the Defendant to protect the Plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water as that it should not impede him in his workings. The water, in that case, was only left by the Defendant to flow in its natural course.

But in the later case of *Baird* v. *Williamson* the Defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water which passed into the Plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without

(1) Sir T. Raym. 421. (2) 7 C. B. 564. (3) 15 C. B. (N. S.) 376.

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negligence, and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of his act, whether skilfully or unskilfully performed, that the Plaintiff had been damaged, and he was therefore held liable for the consequences. The damage in the former case may be treated as having arisen from the act of God; in the latter, from the act of the Defendant.

Applying the principle of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The Plaintiff had a right to work his coal through the lands of Mr. *Whitehead*, and up to the old workings. If water naturally rising in the Defendants' land (we may treat the land as the land of the Defendants for the purpose of this case) had by percolation found its way down to the Plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the Plaintiff, he would have done no more than he was entitled to do; for, according to the principle acted on in *Smith* v. *Kenrick*, the person working the mine, under the close in which the reservoir was made, had a right to win and carry away all the coal without leaving any wall or barrier against *Whitehead's* land. But that is not the real state of the case. The Defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the Plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the Defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the Defendant in Error.

Judgment of the Court of Exchequer Chamber affirmed.

Lords' Journals, 17th July, 1868.

Attorneys for Plaintiffs in Error: *N. C. & C. Milne.*
Attorneys for Defendant in Error: *Norris & Allen.*

HENRY FREDERICK DOWNES . . . . APPELLANT;

AND

JAMES SHIP AND S. L. PRICE . . . . . RESPONDENTS.

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May 1, 4; July 21.

Company—Variance between Prospectus and Memorandum of Association—Delay.

Where it is clear that the objects of a company, as set out in the memorandum of association, go far beyond what was indicated in the prospectus, on the faith of which prospectus a person had applied for and obtained shares, he is, unless barred by laches or acquiescence, entitled, on discovering the difference, to have his name removed from the company.

A mere difference in the language of the prospectus and the memorandum would not relieve him from his liability. The question would be, whether the obligations incurred under the two documents were substantially different.

A person who takes shares on the faith of a prospectus the terms of which are materially varied by the subsequent memorandum of association must claim his exemption from that cause within a reasonable time after the memorandum has been issued; otherwise he will be debarred by his laches from doing so. This especially applies in the case of a contest between the shareholder himself and another shareholder, or between him and the official liquidator.

But this rule of reasonable time will not apply in the case of a contest between the shareholder and a person who prepared the prospectus, and afterwards issued the memorandum of association.

Where, therefore, in May, 1864, *A.* published a prospectus of a proposed company, and *B.* took shares in it, and paid the first deposit, and a memorandum of articles of association was registered in June, and *B.* paid a farther deposit, and an application was afterwards made by a third person to wind up the company, and then, in January, 1865, after an inquiry instituted by *B.*, in December, 1864, he applied for and obtained an Order to have his name removed from the register of the company upon the ground that the memorandum varied in many important respects from the prospectus, so as, in fact, to constitute a totally different undertaking, and alleged that till December, 1864, he had never known of the difference between the two documents:—

Held, that an application by *A.* to rescind the order for the removal of *B.*'s name had been rightly refused by the Court below, whatever might be *B.*'s liability as between himself and the official liquidator, or another innocent shareholder, or a creditor of the company.

THIS was an appeal against an Order of the Lords Justices of the 19th of April, 1865 (1), by which their Lordships had refused

(1) 2 De G. J. & S. 544.

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to discharge an Order made by Vice-Chancellor *Wood* on the 16th of February in that year.

The facts of the case were these:—In the early part of 1864 one *Alexander Hamilton Gunn* issued a prospectus (in which *Henry Frederick Downes* was named as one of the directors) of a new joint stock company to be called the "*Scottish and Universal Finance Bank,*" to be incorporated under the *Limited Liability Act,* the capital to be £1,000,000 (with power to increase it to £5,000,000) in 20,000 shares of £50 each. First issue, 10,000 shares; £1 to be paid on application, £4 on allotment, and £5 in three months. The prospectus contained the words "Home, Foreign, and Colonial Contracts," and began by remarking on the alleged great success of the "*Crédit Mobilier* of *Paris,*" the want in *Scotland* of an institution "founded on similar principles, but embracing a larger field for its operations," and went on thus to describe the objects proposed to be effected by the company:—

10 L.T. 74

"1. To receive money at call or on deposit for fixed terms, and the ordinary business of bankers.

"2. To grant temporary or permanent loans on approved public securities or private undertakings of undoubted merit and known solidity.

"3. To make advances on merchandise, and dock and other warrants, on title deeds of property in possession or reversion, for any temporary purpose, on contracts for the carrying out or the finishing of works, or any other securities where their safety is unquestionable, and the benefit to the company sufficiently advantageous.

"4. The purchase and sale of the precious metals in all their forms. The company will be enabled by its facilities and connections to import and export bullion, and to deal in foreign coins and bank notes on an extensive scale.

"5. By means of the *Paris* branch it is proposed to undertake the shipment of silver to the *East viâ Marseilles,* which can be done at a considerable saving of expense and time.

"6. The business transacted by the issue of small bills and letters of credit for the convenience of travellers and emigrants is incredible. Remittances from *America* to *Ireland* alone amount

to several millions sterling per annum. By affording the same facilities to the English, German, and French population of *America* it is confidently anticipated that most profitable business can be done.

"7. To negotiate approved foreign or inland bills, to transmit funds in specie or otherwise to any foreign state, and to arrange purchases or sales of any British or foreign securities at home or abroad.

"8. To cash coupons, and realise or undertake the management of the dividends on loan or other securities."

In May, 1864, *Ship* received a copy of this prospectus, and, in the form of application which accompanied it, applied for fifty shares, and forwarded a cheque on his bankers for £50.

On the 1st of June, 1864, the memorandum of association was registered. The name then assumed was the "*Scottish and Universal Finance Bank, Limited.*" The 3rd section of the memorandum was in these terms: "The objects for which the company is established are the transacting in *Great Britain* and in foreign parts every kind of business, the receiving of deposits of money, whether at interest or otherwise, the advancing and lending of money on real, personal, or mixed securities, and on cash, credit, or other accounts, on policies, bonds, debentures, bills of exchange, promissory notes, letters of credit, or other obligations, on ships and shares of ships, either British or foreign, or rates or tolls of trustees, of commissioners of public docks, harbours, or other public works, or of any other body of persons, whether corporate or otherwise, duly authorized to make, levy, or collect rates or tolls under the provisions of any local or general Act of Parliament." Then followed something like a repetition of the prospectus as to transactions that usually are known to come under the description of banking business, and the memorandum went on thus:—

"1. To negotiate loans of all descriptions.

"2. To apply for and obtain for itself, or in conjunction with any other companies or parties, and to assist other companies or parties in applying for and obtaining, Acts of Parliament, authorizations, or concessions, for the construction of railways or other undertakings or works, public or otherwise, either at home or abroad, and to make either itself, or in conjunction with other

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companies or parties, the advances or deposits of money by way of caution or otherwise necessary to obtain and carry out the said several objects.

"3. To take concessions by purchase or otherwise of, or lease or work railways or other undertakings, and either carry them out itself, or in conjunction with other companies or parties, or make them over wholly or partly to other companies or parties.

"4. To take contracts, and to carry them out, either on its own account, or by letting them to sub-contractors.

"5. To buy and sell all descriptions of produce or merchandize, bullion or specie, and of stocks, shares (including shares issued through the agency or guaranteed by the company), bonds, mortgages, debentures, or obligations, on its own account, or for a commission, not being purely speculative transactions for the rise or fall in prices, and in which it has no other interest, nor time bargains intended to be settled by a difference, nor being the undertaking of the ordinary business of a stock broker or jobber, and to re-issue any such stocks, shares, or other securities, with or without the company's guarantee.

"6. To make advances on such stocks or other securities, and on property of all descriptions, either with or without the borrower's bills or promissory notes.

"7. To accept and indorse bills.

"8. To receive moneys on loan or deposit.

"9. To enter into treaty, act, or unite with, amalgamate, buy up, or absorb any other company or business, whether English or foreign, and especially to adopt and carry into effect, so far as the company shall deem expedient, three several agreements, the first dated at *Paris* the 20th day of April, 1864, between *Victor Monteaux* and *Alexander Hamilton Gunn;* the second dated at *London* the 3rd day of May, 1864, between *David Nathan* and the said *Alexander Hamilton Gunn;* and the third dated at *London* the 11th day of May, 1864, between the said *Alexander Hamilton Gunn* of one part, and *Henry Haggard, Robert J. Sellar*, and *William J. Watson* of the other part.

"10. Generally to transact any businesses of bankers, bullion and exchange brokers, and of a merchant contractor and capitalist, as principal or agent, in any part of the world which may not, in

the articles of association, or by special resolutions of the company, be prohibited."

Henry Frederick Downes was one of the subscribers to the registration (1).

On the afternoon of the 1st of June the fifty shares which had been applied for by *Ship* were allotted to him, and his name was entered on the register of the company. On the 13th of June he sent a cheque for the call of £4 per share.

Printed copies of the memorandum were kept at the office of the solicitor to the company, but there was no proof that *Ship* had ever seen them there.

On the 4th of August *Ship* received notice of a call, and letters on the subject were written to him on the 8th of September and the 18th of October, but he took no notice of them.

In December, 1864, a Petition was filed in Chancery to wind up the company, and *S. L. Price* was appointed official liquidator of the company.

On the 14th of January, 1865, before the hearing of the Petition for winding up the company, *Ship* filed a notice of motion to have his name removed from the register of members of the company. He filed an affidavit in support of this Petition, in which he alleged that he had applied for the shares and paid the calls on the faith of the statements contained in the prospectus, that the objects of the company as set forth in the two documents were very different, that he never intended to apply for, and never had applied for and accepted, shares in the company registered on the 1st of June under the memorandum.

On the other side affidavits were filed with a view to shew that the company in which *Ship* now represented he had applied for shares was, in fact, only a company put forward at the moment to secure a particular name, and was in reality registered on the 5th of May; but that the real company in which he had, in truth, applied for shares was that which was registered on the 1st of

(1) There had been, on the 5th of May, 1864, a registration of a "*Scottish and Universal Finance Bank, Limited*," where the £1,000,000 capital and the 20,000 shares were struck out, and £2000 capital and forty shares were substituted. The name of the solicitor was the same in each registration, the names of the subscribers were different.

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June, and that and its objects were truly described in the memorandum, which he had had ample opportunity to examine.

The cause was heard by Vice-Chancellor *Wood* on the 16th of February, 1865, and an Order made by him to remove the name of *Ship* from the register of the company. Mr. *Price*, the official liquidator, appealed against this Order. When the appeal came on for hearing *Downes* (admitting his own liability as a contributory) was allowed to intervene, and to give an original notice on his own behalf to discharge the Vice-Chancellor's Order. This notice he accordingly did give, and affidavits were filed on both sides. Those filed by *Downes* were for the purpose of shewing that the description of the company in the prospectus, and the terms there used, must have informed *Ship* of the true nature of the undertaking, and have shewn that it was more than a mere banking company—that he had had from the 1st of June the opportunity of inspecting the memorandum, and thus of precisely knowing the objects of the company and the means intended to be used in effecting them, and it was insisted that he was bound by the long period he had allowed to intervene before applying to have his name removed.

On the 19th of April, 1865, the Lords Justices declined to dischange the Vice-Chancellor's Order, and the present appeal was brought against their Order of refusal (1).

Mr. *Mellish*, Q.C., and Mr. *Mackeson*, for the Appellant:—

This case was the first in which the doctrine was declared that a material difference between the prospectus and the memorandum of association would entitle a person to withdraw from being a member of the company. At that moment there had been no declaration as to the limit of time within which the right to withdraw must be claimed and exercised. Here the alleged variance between the prospectus and the memorandum existed almost from the first moment of *Ship's* connection with the company. In the cases which had since occurred, and of which *Peel's Case, In re Barned's Banking Company* (2) was one, that question had been

(1) As the Lord Chancellor (Lord *Cairns*) had been counsel in the cause in the Court below he declined to hear the appeal.

(2) Law Rep. 2 Ch. Ap. 674.

much considered, and it had been held that even where there was a real variation between the two, the shareholder must take advantage of it at the earliest moment, or he would be bound. That rule had been expressly adopted by all the noble and learned Lords who delivered their opinions in *Oakes* v. *Turquand* (1). It is true that the double registration here of the same name of a company might be set up as possibly tending to mislead *Ship* into error, but the dates and the facts shew that he could not thereby have been misled. If so, then it is clear that he duly accepted shares in this company—had notice of its objects, and slept on his rights from the 1st of June to December.

There was not here any pretence to charge fraud, and the words in the prospectus referring to the *Crédit Mobilier* in *Paris*, and various other expressions there used, must have made any person aware that the business to be transacted was not merely that of an ordinary banking company. *Ship* had done everything that the law required to make him a member of the company, and that being so, and the memorandum having been duly registered, he became, under the *Companies Act* of 1862 (2), bound from that moment "as if he had subscribed his name and affixed his seal thereto." *Peel's Case*, already referred to, shews that if there was a material variation between the prospectus and the memorandum, he must be treated as bound to become acquainted with it at the earliest possible time, and that must certainly be a rule enforced by the Courts of Equity, for otherwise many persons who became members on the faith of seeing the name of some particular person as a member might be cruelly misled. At all events as between himself and the company's creditors, and the company itself, in other words the body of other shareholders, *Ship* continued liable. [LORD WESTBURY:—Do you put your argument on acquiescence —do you say that from knowledge, or the means of knowledge, and inferred acquiescence, he was bound, or that he was so on the parliamentary provision as to the effect of the registration of the memorandum? There is a great difference between them.] On both grounds it is submitted that he must be treated as liable.

The Appellant here stands in the position of a creditor, and is

(1) Law Rep. 2 H. L. 325. (2) 25 & 26 Vict. c. 89, s. 11.

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entitled to even more consideration, for he has paid as a contributory.

The claim of *Ship* for exemption is answered by his delay. In *Lawrence's Case* (1) the application for shares was made on the 4th of September, 1865, the registration was on the 11th of September, the shares were allotted on the 10th of October, payment on them was made on the 14th; on the 14th of May, 1866, the shareholder got a copy of the memorandum and laid it before his solicitor on the 16th, to advise on his position. On the 27th of September he gave notice of his intention to repudiate his shares; but Lord Justice *Cairns* held that that was too late. So, also in *Kincaid's Case* (2). And again, in *Wilkinson's Case* (3), a delay between the 28th of April in one year and the 27th of July in the next year was held fatal to the claim for relief.

A company is not bound by all that is stated in the prospectus. As was observed in *Oakes* v. *Turquand* (4), that is, and is to be taken as, a mere flourishing description of prospective advantages. But the memorandum contains the contract by which each member of the company is bound, and it is his duty to make himself acquainted with it, and if he neglects that duty he must take the consequences. This is not like the case of the *Venezuela Company* v. *Kisch* (5), where there was a gross misrepresentation as to the capital of the company, nor can it be brought under the principle laid down in *Gow* on Partnership (6), where the contract is itself illegal. *Ship* might have had a copy of the memorandum forwarded to him, and need not have gone to the office to examine it. The 19th section of the Act of 1862 provides that on the payment of 1*s*., or less, he shall be entitled to have a copy forwarded to him, while the company is under a penalty of £1 for neglecting to send it if he demands it. It was therefore his own fault that immediately after its registration he was not acquainted with the particulars of it. He is not entitled to take any benefit from his own neglect.

Sir *R. Palmer*, Q.C., and Mr. *Locock Webb*, for the Respondent *Ship*:—

There are two considerations which dispose of this case, inde-

(1) Law Rep. 2 Ch. Ap. 412.
(2) Ibid. 426.
(3) Ibid. 536.
(4) Law Rep. 2 H. L. 325.
(5) Ibid. 99.
(6) 3rd Ed. p. 398.

pendently of the argument on the other side. First, that this is a question with Mr. *Downes* and not with the creditors of the company or with the liquidator; secondly, that the company on the list of whose contributories it is proposed to place the name of *Ship*, is not the company in which he took shares. As to the first: *Downes* is here one of the persons who issued the prospectus, and also one of those who subscribed the registered memorandum. If the first of these propositions cannot be contested then this is a mere question between *Ship* and *Downes*, and, as to the latter, the former is clearly entitled to relief on account of the great variance between the two documents. Now, as to such a case, the rule laid down in *Reynell* v. *Sprye* (1), and adopted in this House in *The New Brunswick Co.* v. *Conybeare* (2), is complete. If a party makes a false representation it may be no answer to a person complaining of being misled by it, to say, "You had the means of ascertaining the truth of my statement if you had thought proper to use them." The reply to this might probably be, "Your representation put me off my guard." So in *Kisch's Case* (3) it was held here that a man who had been by fraudulent representations induced to enter into a contract, could not be held rosponsible on that contract by those who had so induced him to enter into it. The same principle was expressed by Vice-Chancellor *Malins* in *Oakes* v. *Turquand* (4), and adopted by this House (5). [LORD WESTBURY:—Is a company answerable for the fraudulent representations of a promoter made before the company comes into existence?] It may not be, if nothing follows from them, but it would be affected if it took advantage of them to enforce on the person misled by them, liabilities which, but for such misleading, he would not have incurred. The shares were taken by *Ship* in this company on the faith of representations in a prospectus, from which a subsequently issued memorandum materially varied.

The 11th section of the 25 & 26 Vict. c. 89, is explained and qualified by the 23rd section, which shews that only he who has seen and subscribed the memorandum is to be fixed with liability as a member of the company.

(1) 1 De G. M. & G. 656, 709.
(2) 9 H. L. C. 711, 742.
(3) Law Rep. 2 H. L. 99.
(4) Ibid. 3 Eq. 576.
(5) Law Rep. 2 H. L. 325.

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It was in the interest of the creditors of a company, and of them alone, that the doctrine was laid down which declared that a man might be held to be a member of a company notwithstanding he had accepted shares in it through the fraud of the directors. That is not the case here. *Downes* was one of those of whose misrepresentations the Respondent *Ship* complains. As against *Downes* therefore, who is the Appellant here, *Ship* is entitled to be released. Now in *Stewart's Case* (1) the shareholder was released, and yet he had held his shares for a longer period than *Ship* had, besides which he had attended meetings, which *Ship* had never done.

As to *Lawrence's Case* (2), it is clear that though a person may possibly be held liable to *bonâ fide* creditors of the company he does not become liable to the company as represented by the directors, and that was the real motive of the observation of Lord Justice *Cairns* in that case (3), that "it is difficult to disembarrass these cases of the effect which a man's name being on the register has in inducing other persons to alter their position." But that observation, repeated and enforced in another part of the case (4), has no force in this case, for here it was *Downes'* representations that induced *Ship* to take the shares, and *Downes* was one of the persons who issued the prospectus and afterwards signed the memorandum. He, therefore, was not influenced by *Ship*, and cannot, on that account, object to the removal of *Ship's* name from the register. But there is another answer to be given to the argument as to the supposed injury to other shareholders, namely, that each case must be disposed of on its own merits alone, and that the shareholders who bought afterwards were, as Lord Chancellor *Chelmsford* said in the *Western Bank of Scotland* v. *Addie* (5), persons who "either bought their shares under circumstances which compel them to hold them, or they also were induced to join the company by false representations."

If *Ship* here agreed to become a member of any company it was the first, namely the banking company, as described in the prospectus. He never assented to become a member of that which was afterwards registered, and which was to undertake every sort

(1) Law Rep. 1 Ch. Ap. 574. 12 Jur. N.S. 735 (3) Law Rep. 2 Ch. Ap. 417.
(2) Ibid. 2 Ch. Ap. 412. (4) Ibid. 425.
(5) Law Rep. 1 Sc. Ap. 163.

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of speculative business. Variations in the representation of a scheme of business amounting, as they do here, to what Equity deems a fraud, are an answer to the objection of delay: *Charter* v. *Trevelyan* (1). As soon as *Ship* really knew of the difference between the prospectus and the memorandum he repudiated his shares. There was no delay after actual knowledge, and in *Kincaid's Case* (2) Lord Justice *Turner*, while agreeing that in that case there had been, after knowledge of the facts, such delay as precluded relief, added (3): "I give no opinion how the matter would have stood if there had been no delay after actual knowledge of the facts." There was none here. On the contrary, Lord Justice *Turner* said (4) that in this case, "up to December, 1864, Mr. *Ship* had no knowledge of these transactions." On every ground, therefore, he is entitled to retain the judgments which have been pronounced in his favour in the Court below.

Mr. *Mellish*, replied.

[Their Lordships considering it possible that the official liquidator had abstained from appealing to this House against the Order of the Lords Justices, in the belief that the appeal of Mr. *Downes* would effectually decide the whole case, intimated that he should be allowed time to consider what course he would pursue. The delivery of judgment in the case was therefore adjourned. See *post*, in Lord *Cranworth's* judgment.]

July 21. LORD CRANWORTH:—

My Lords, my noble and learned friend on the woolsack not having been present at the hearing of this case, I feel it to be my duty to move the judgment of your Lordships.

There cannot, I think, be any doubt but that the objects of the business to be carried on by the company, as they are set out in the memorandum of association, go so far beyond what was indicated by the prospectus that, excluding all questions of laches and acquiescence, Mr. *Ship* was entitled to have his name removed from the company. By the 10th head in the memorandum of

(1) 11 Cl. & F. 714: see also *Savery* v. *King*, 5 H. L. C. 627.
(2) Law Rep. 2 Ch. Ap. 412, 420.
(3) Ibid. 427.
(4) 2 De G. J. & S. 556.

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association the company is authorized to transact any business of a merchant, contractor, and capitalist, as principal or agent, in any part of the world; that is, substantially, to engage anywhere in any business, and to enter into any commercial contracts whatever. There was nothing in the prospectus warranting this.

It was contended, however, on the part of the company, that every person who agrees to take shares under a prospectus describing the nature of the business proposed to be carried on by a company about to be formed must know that the objects of the company, as they will be defined in the memorandum of association, cannot strictly agree with those objects as defined in the prospectus. The prospectus, it was alleged, is or may be framed, not by a lawyer, but by commercial men or speculators. And when the memorandum of association comes to be framed by a professional man there must often be deviations from the language of the prospectus. The prospectus, it was said, is in the nature of instructions only, for the professional man to put into shape, in the same way as an agreement is often the foundation for a deed, which may properly contain covenants and provisions not found in the agreement itself.

This is so far true, that it would be no ground of complaint on the part of a person who had agreed to become a shareholder in a business described in a prospectus, that the language of the memorandum of association was not that used in the prospectus. The question would be, whether the obligations incurred under the memorandum do or do not go beyond those which would have been incurred under the prospectus. Now here there cannot, as I conceive, be a doubt on that subject—*Res ipsa loquitur*. The prospectus defined particular classes of business. The memorandum of association, in Article 10, authorized the carrying on of any business whatever in every part of the world. The analogy attempted to be drawn between an agreement and a deed subsequently framed upon it, containing covenants not adverted to in the agreement, on the one hand, and this prospectus, followed by the memorandum of association, on the other, fails wholly, unless it can be established that here the 10th Article only more fully expressed that which is impliedly included in the prospectus. That this is not so is plain, not only from the documents themselves, but also from the evidence adduced by the Appellant. In

support of his motion before the Lords Justices he filed several affidavits made by persons apparently conversant with speculative business, such as that carried on by the *Crédit Mobilier* of *Paris*, and other associations formed for similar objects; and the persons making these affidavits state, more or less distinctly, what amounts to this, that in their judgments the terms of the prospectus would have warranted a memorandum of association declaring the objects of the company to be the carrying on of business similar to that of the *Crédit Mobilier* of *Paris*. But in no one of the affidavits is it stated that, in the opinion of the person making it, the prospectus warranted the insertion of the tenth clause of the memorandum of association, or that the objects there referred to do not go beyond the business of what they describe as finance companies. I think it clear, therefore, that, unless barred by laches or acquiescence, Mr. *Ship* was clearly entitled to have his name removed from the register.

But then it was argued, on the part of the Appellant, that he is barred by delay from the relief (if any) to which he might otherwise have been entitled. The letter of allotment of the 8th of June, 1864, informed him that the company was then formed, and that a memorandum of association, stating the particulars of its business, had been registered. He took no steps to acquaint himself with its contents till the month of December, 1864, and he then, as he says, for the first time became aware of the memorandum of association of the 1st of June, 1864, the objects stated in which, he insists, differ materially from those held out by the prospectus.

It was argued on behalf of the Appellant that to allow Mr. *Ship's* name to be removed from the register after he had waited more than six months before he made any complaint as to the terms of the memorandum of association, would be unjust to the other shareholders, and to creditors of the company who may have trusted it on the faith of its including Mr. *Ship's* name.

There is great force in this reasoning. When a person has become a shareholder in a joint stock company it is no part of his duty to take part in the management of its affairs. He is entitled to be passive, and to rely on the directors for the due discharge of their duties towards him and the other shareholders. This is in

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strict conformity with the principles on which all joint stock companies are carried on, and with the statutes regulating them. And if the directors are guilty of any breach of duty towards the shareholders, it is not in general to be considered as laches on the part of the shareholders that they have suffered a long time to pass without complaining, unless they can be treated as having had knowledge of the acts complained of. But a person having agreed to take shares on the faith of a prospectus, and afterwards complaining that the memorandum of association under which the company has been incorporated is not warranted by the prospectus, stands in a very different position from that of a shareholder injured by the acts of directors after a company has been formed. When, on the faith of a prospectus, a person agrees to take shares in a projected company the terms of whose business are thereby defined, if those who afterwards form the company include in the memorandum of association terms not to be found in the prospectus, the person who had applied for shares on the faith of the prospectus may refuse to accept an allotment of shares, and may recover back any deposit he may have made.

7 Eq 278

If, instead of taking this course he accepts his shares, and abstains from examining the memorandum of association with all reasonable diligence, I think the Court ought to be very slow in giving him relief under the 35th section of the *Companies Act*, 1862. For the relief, it must be observed, is not given at the expense of those who have done him a wrong by registering a memorandum of association differing from that which had been circulated by the promoters of the company before it was formed, but at the expense of the persons who have taken shares in the company after it has been formed, who may never have seen the prospectus, and so are perfectly innocent; and, farther, to the possible damage of creditors who may have trusted the company on the faith of the complaining party being a shareholder.

I have thought it right to make these general remarks, because in the argument at the Bar it seemed to be supposed that Mr. *Ship* had a right to rely on the prospectus, and assume without investigation that it had been correctly followed by the memorandum of association. That is a doctrine to which I do not agree. But in the present case the general question does not arise. There

are special grounds on which I am prepared to say that the Order ought to be affirmed. When the case was before the Lords Justices, they, for some reason which does not appear in the papers before us, gave the Appellant, Mr. *Downes*, who is a shareholder in the company, liberty to give an original notice of motion before them to discharge the Order of Vice-Chancellor *Wood* whereby Mr. *Ship's* name had been removed from the register. Such notice was accordingly given, and the motion was heard before the Lords Justices on the 19th of April, 1865. But their Lordships refused the application with costs.

Now the only Order appealed against is that Order, and the only Appellant before your Lordships is Mr. *Downes;* and I think it is impossible for him to set up any case of laches against Mr. *Ship*. He was one of the persons who issued and signed the prospectus, and he may therefore be treated as if he had said to Mr. *Ship*, "I am about to concur with others in forming a joint stock company for certain limited objects, in which I invite you to take shares and make a deposit." Mr. *Ship*, on this invitation, agreed to take fifty shares, on which he paid a deposit of £50. Afterwards Mr. *Downes*, with others, registered a memorandum of association not warranted by the prospectus. As against Mr. *Downes* I think *Ship* is certainly justified in saying: "You cannot complain of delay. I trusted to your assurance of what the terms of the association should be. You registered terms different from those you had promised to register. You never informed me of the change, and now you complain that I trusted you too implicitly."

On this short ground I have no hesitation in saying that I think this appeal ought to be dismissed with costs.

When the case was heard, now more than two months ago, it was suggested that the official liquidator would perhaps have appealed against the Order made on the hearing of his case before the Lords Justices had he not thought that the question might be decided on the appeal of the present Appellant, and so that he had abstained from appealing to your Lordships for the purpose only of avoiding unnecessary costs. For this reason the House determined not to give judgment until a sufficient time had elapsed to enable the official liquidator, if he thought fit, to appeal. A month was allowed for that purpose; no appeal was presented within that

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time. We are informed that he has now appealed; but as that course was not taken till it had become impossible that the appeal should be heard in the present session, we have thought it right to give judgment in this case. I therefore move your Lordships that the Order of the Court below be affirmed, and that the appeal be dismissed with costs.

LORD CHELMSFORD:—

My Lords, the circumstances of this appeal have been fully explained by my noble and learned friend who has just addressed your Lordships.

I agree entirely that the business proposed to be carried on by the company in the prospectus issued before its formation was largely extended by the description given of the intended nature of the company's transactions in the memorandum of association. Any person, therefore, who, upon the faith of the prospectus, had been induced to obtain an allotment of shares, and who thereupon referred to the memorandum of association, and found that the business was to be of a different and more extensive character than that which the prospectus indicated, would be entitled to withdraw from the company, and to have his name removed from the register, under the 35th section of the 25 & 26 Vict. c. 89 (the *Companies Act*, 1862). By the 11th section of this Act the memorandum of association of a company, when registered, is as binding on each member of the company "as if he had subscribed his name and affixed his seal thereto." I do not understand this to mean that when once the memorandum of association is registered it is no longer open to objection by a member of the company, as it certainly would have been the case if he had signed and sealed it. But this enactment, requires at least that persons who take shares in a company should make themselves acquainted with the memorandum of association which defines the objects for which the company has been formed, and regulates the mode in which it is to be carried on. And if shareholders will neglect the means of information thus placed within their reach, they cannot fairly claim to be discharged from their contract with the company because they afterwards discover that the business of the company described in the memorandum of association is of a more extensive

and different character from that which had been proposed in the prospectus.

In the case of *Oakes* v. *Turquand* (1) I expressed my agreement with the opinion of my noble and learned friend Lord *Cairns* in the case of *Ex parte Peel* (2), as to its being "the bounden duty of a person to ascertain at the earliest practicable moment what is the charter or title deed under which the company in which he has agreed to become a shareholder is carrying on business." I am strengthened in this opinion by the reference which I have already made to the section of the *Companies Act* which gives a binding effect to a registered memorandum of association, and by a principle which is of general application—that a person cannot plead ignorance of the terms of a contract into which he has knowingly entered.

The knowledge which is imputable to a shareholder under the circumstances above mentioned is of the engagement by which he has bound himself, and with which it is not an unreasonable presumption that he has made himself acquainted.

This case must be distinguished from those where it has been sought to bind shareholders by the acts of directors of a company which were *ultrà vires*. A shareholder must be considered to be fully informed of the powers given to directors by the deed of association to which he is either actually or constructively a party. But he is not bound to know, and practically he rarely does know, whether the directors are acting within or exceeding the scope of the authority entrusted to them. Therefore, as your Lordships lately held, in a case of *Spackman* v. *Evans* (3), where the directors had exceeded their powers in allowing certain shareholders to forfeit their shares, and retire from the company, the acquiescence of the remaining shareholders was not to be presumed, in the absence of proof of actual knowledge, or of means of knowledge, of which they had neglected to avail themselves.

In the present case the contest is not between Mr. *Ship* and the official liquidator, or between him and an innocent shareholder; as between these parties the case would have assumed a very different aspect. The official liquidator who represents the company

(1) Law Rep. 2 H. L. 352. (2) Law Rep. 2 Ch. Ap. 674, 684.
(3) *Ante*, p. 171.

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for payment of its debts would probably have urged with success that Mr. *Ship*, having received a letter of allotment of his shares on the 8th of June, 1864, informing him that a memorandum of association stating the particulars of the business of the company had been registered, the contents of which he never made himself acquainted with till the month of December, 1864, had concluded himself by his laches from his objection to the extension of the transactions of the company so much beyond those which were proposed by the prospectus.

If, too, the question as to Mr. *Ship's* name being continued on the list of contributories had arisen between him and one of the other shareholders, I am disposed to think that the same objection might have been urged against his removal from the list by a person free from any personal exception, and interested in there being no diminution in the number of contributories.

But for some reason, which I am unable to comprehend, Mr. *Downes* was permitted to intervene in the appeal of the official liquidator to the Lords Justices, from the order of Vice-Chancellor *Wood* removing Mr. *Ship's* name from the register of shareholders of the company. Both Mr. *Downes'* motion to discharge the order under appeal, and that of the official liquidator, were refused with costs.

Against the refusal to grant his motion Mr. *Downes* has appealed; and the question before your Lordships must be decided with reference to the rights of the Appellant and Respondent as between themselves. Can Mr. *Downes* insist on retaining Mr. *Ship's* name on the register of shareholders of the company? He was one of the parties to the prospectus by which the objects proposed to be effected by the company were published to the world, and upon the faith of which Mr. *Ship* applied for his shares. He was also a party to the memorandum of association by which the business of the company was extended greatly beyond the terms of the prospectus. Mr. *Ship* was undoubtedly guilty of negligence in not availing himself of the information which the memorandum would have afforded him. But does it lie in Mr. *Downes'* mouth to excuse himself by accusing Mr. *Ship*, or to insist upon holding him to a contract into which Mr. *Ship* never intended to enter, and never would have entered, but upon the faith that the terms of the

prospectus would constitute the basis of the company? I proceed entirely upon the personal exception to Mr. *Downes* in this case. I say nothing as to what would have been Mr. *Ship's* position if the official liquidator, or an innocent member of the company, had been litigating the question of his right to be removed from the list of contributories. Mr. *Downes* has, in my opinion, precluded himself from insisting upon retaining Mr. *Ship* in the company, and his appeal must therefore be dismissed with costs.

LORD WESTBURY:—

My Lords, the equity of *Ship*, the Respondent, lies in the difference between the statements in the prospectus and the memorandum of association that was afterwards filed. *Ship* had a right, as against every person making the representation contained in the prospectus, to assume that the memorandum of association followed the prospectus. Now *Downes* was one of the original directors of the company who issued the prospectus; *Downes*, therefore, cannot assert that *Ship* entered into any contract of partnership which is inconsistent with the statement contained in the prospectus. If the prospectus described one undertaking and the memorandum of association described a different undertaking, *Ship* has a right to say, "I never became a party to the undertaking described in the memorandum of association. I applied for shares, and accepted shares, upon the faith of the assurance contained in the prospectus that the association would correspond with the statements which are contained therein."

My Lords, as to the other point, whether it would be competent to any other shareholder to state that *Ship* ought to be bound by the memorandum by reason of his having allowed his name to be registered as a shareholder, after the memorandum he complains of had been filed under the statute, on that point I give no opinion whatever. And whatever may have been said, it will be understood that the decision of your Lordships proceeds entirely upon what my noble and learned friend, who last spoke, has correctly described as the personal exception to the individual *Downes*, and his being thereby personally estopped from saying that *Ship* ought to be bound by a memorandum differing from the prospectus which contained the representation made by *Downes* himself, and others

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with whom he was associated. Very great difficulty may be felt upon the other point, and it would be wholly premature to indicate any opinion respecting it, seeing that by possibility it may be made the subject of another proceeding. All that your Lordships can, as I humbly submit, determine by your present judgment, is that *Downes* is incompetent to maintain this appeal, or to complain of the order, and that therefore this appeal ought to be dismissed with costs.

LORD COLONSAY:—

My Lords, having had an opportunity of seeing the opinion of my noble and learned friend opposite, I do not think it necessary to say anything, because I concur in the whole of that opinion. The statement of the case was complete; and the conclusion at which he arrived, that Mr. *Downes* is precluded from objecting to the removal of Mr. *Ship's* name from the register (which is the whole point in the case) is one in which I entirely concur. I do not desire to express, on the contrary I desire to reserve, any opinion upon a question which is likely to come before us at the instance of the official liquidator, who represents other interests, and who may very consistently set up a case from which the present Appellant is precluded. I concur entirely in the judgment proposed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journal, 21st July, 1868.

Solicitors for the Appellant: *Valpy & Ledsam.*

Solicitors for the Respondent: *Samuel Anthony Rice; William Burgon.*

Solicitors for the Official Liquidator: *Ashurst, Morris, & Co.*

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ACTS, OVERT: *See* CONSPIRACY; PLEADING.

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AGE: *See* JURY.

AGREEMENT—*L.* was the holder of a lease of premises from *S.* for twenty-one years, determinable at the will of either party at the end of the first seven or fourteen years. The first seven years would expire at Christmas, 1863. *L.* had expended considerable sums on the premises, for which he was to receive £1800 from *R.*, to whom he agreed to assign the lease. The agreement contained these stipulations:—"If *R.* is ejected by *S.*, the £1800 to be repaid to *R.* If *S.* exercises the power of determining the lease at Christmas, 1863, and *R.* leaves the house, £1100 are to be returned to *R.* If at Christmas, 1863, the tenancy of *R.* is continued, the £1800 to be retained by *L.*" *R.* entered into possession, and his aunt, Mrs. *C.*, resided with him. In May, 1863, *S.* gave notice of an intention to determine the tenancy. At Christmas, 1863, Mrs. *C.* became lessee to *S.*, under a new lease, at a largely increased rent. *R.* continued to live in the house after his aunt, Mrs. *C.*, had become the lessee. *R.* claimed the return of the £1100 under the agreement. There were equitable defences to the effect that the new arrangement was collusive as between *R.*, *S.*, and Mrs. *C.*, but there was no proof that *R.* was the person really liable under the new lease:—

Held, affirming the judgment of the Court of Exchequer Chamber (which had reversed a previous judgment of the Court of Exchequer), that the agreement must be construed as applying entirely to a legal termination of *R.'s* tenancy, which having taken place, he was entitled under the agreement to the return of the £1100. *Lucas* v. *Rideout* 153

ALIEN: *See* COPYRIGHT.

APPEAL: *See* COSTS; PRACTICE.

M. H. C. instituted a suit in Chancery in *Ireland*, against *C. P. L.*, executor of *T. P. L.*, in respect of an act done by *T. P. L.* in his lifetime. The suit was dismissed. *M. H. C.* appealed to this House against the dismissal. Before the appeal could be heard, both *M. H. C.* and *C. P. L.* died. *R. R.* took out letters of administration to *C. P. L. de bonis non* of *T. P. L.*, and *L. M.* took out administration with the will annexed to *M. H. C.* *L. M.* then obtained, in the Court of Chancery in *Ireland*, an Order to revive the suit as against *R. R.*, and afterwards presented a Petition to this House that the appeal might stand revived as between himself and *R. R.* as administrator *de bonis non*. *R. R.* objected, under these circumstances, to the competency of the appeal. The Appeal Committee ordered the objection to be argued at the Bar of the House:—

Held, that it was too late to take that objection here, and that the

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proper course for *R. R.* would have been to resist the Order for revivor made in the Court of Chancery in *Ireland*.

The appeal itself was heard and dismissed with costs, from which would have been deducted the costs, if any, of presenting the objection of want of competency to the Appeal Committee. *Conolly* v. *Luscombe*. *Mooney* v. *Robinson* 139

ARRAY, CHALLENGE TO: *See* JURY.

ARTICLES OF ASSOCIATION: *See* COMPANY.

Where it is clear that the objects of a company, as set out in the memorandum of association, go far beyond what was indicated in the prospectus, on the faith of which prospectus a person had applied for and obtained shares, he is, unless barred by laches or acquiescence, entitled, on discovering the difference, to have his name removed from the company.

A mere difference in the language of the prospectus and the memorandum would not relieve him from his liability. The question would be whether the obligations incurred under the two documents were substantially different. *Downes* v. *Ship* 343

ASSOCIATION, MEMORANDUM OF: *See* COMPANY.

"AT MY SON'S DEATH": *See* WILL. 1.

"AUTHOR"—The word "author" is used in the statute 5 & 6 Vict. c. 45, without limitation or restriction, and is therefore equally applicable to foreigners as to British subjects.

An alien friend who, during the time of his temporary residence in a British Colony, publishes, in the *United Kingdom*, a book of which he is the author, is, under the 5 & 6 Vict. c. 45, entitled to the benefit of English copyright. *Routledge* v. *Low* 100

BANKERS—In order to hold a banker justified in refusing to pay a cheque of his customer, the customer being an executor, and drawing a cheque as executor, there must be a misapplication of the money intended by the executor, so as to constitute a breach of trust, and the banker must be cognisant of that intention.

The existence of a personal benefit to the banker, designed or stipulated for, as a consequence of the payment, would be strong evidence that the banker was privy to the breach of trust.

R. G. & Co., bankers, had acted as such to *T. J.*, who carried on business with his son-in-law under the style of *J. & M.*, but whose accounts with them were kept in his own name alone, and were unsettled at his death. He left a will, bequeathing all his property to the use of his wife for life, and after her death to be divided among their children as she might think fit; part of the property consisted of life policies which were put into the hands of the bankers, together with the probate of *T. J.'s* will, and they received the amount of the policies, made up their accounts, and, after deducting their own unsettled claims, declared a certain sum to remain due from themselves to the executrix. She continued her husband's business with his late partner under the style of *J. & M.*, and a new account was opened with the bankers in the name of the new firm, and she, as executrix, drew a cheque for the amount stated to be due to her, and paid it in to the bankers, to be credited to the firm of *J. & M.*, and it was so credited and paid out, with other money, on account of cheques drawn by the new firm:—

Held, that these circumstances were not, in themselves, sufficient to shew that a breach of trust had been committed, and that the bankers knew of the intention to commit it, so as to render them liable (in a

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suit by the children of the testator) to replace the money. *Gray* v. *Johnston* 1

BENEFICE: *See* CLERGY.

BRITISH MUSEUM: *See* COPYRIGHT.

CANONS (OF 1603): *See* CLERGY.

CHALLENGE: *See* JURY.

CLERGY: *See* PLEADING. 1.

The Canons of 1603 have not been allowed and received so as to form part of the law of *England*, and bind the laity as well as clergy (*Middleton* v. *Crofts* (2 Atk. 650; 2 Str. 1056) confirmed). But even if binding on the clergy,—then,

The 39th Canon of 1603 applies only to the institution of a presentee to a benefice.

The 48th Canon of 1603 does not apply to a presentee to a benefice, but does apply to a person seeking to be admitted as curate to an existing incumbent.

The right of a patron to present to a benefice is a legal right, subject in its exercise to the bishop's right to examine into the fitness of the presentee, and to reject him for sufficient ground.

A clerk who has held preferment in one bishopric is not, on being presented to a living in another bishopric, bound, as a condition precedent to his examination on the question of fitness, to produce letters testimonial and commendatory from his former bishop. *Bishop of Exeter* v. *Marshall* 17

COLLUSION: *See* MARRIAGE; PLEADING.

1. COMPANY—Though the directors of a company may grant to a dissenting shareholder leave to retire from the company on conditions which they deem prudent and advisable to be granted in his case, yet if such conditions are not in accordance with the terms of the deed of settlement, or with conditions for retirement, notice of which was distinctly given to all the shareholders, and which were agreed on at a public meeting of the shareholders, though he performs the conditions on which such leave was granted, and his name is for years removed from the lists of the shareholders, and the company changes its form of conducting its business (of which he has no notice), and dividends are received (in which he does not participate), he is liable to have his name inserted in the list of contributories on the final winding-up of the company (*diss.* Lord *St. Leonards* and Lord *Romilly*). *Spackman* v. *Evans* .. 171

A joint stock company was formed: a deed of settlement was executed, which had in it various clauses as to the admission and withdrawal of shareholders, and the transfer and forfeiture of shares. On difficulties arising in its business a proposition was made to allow, on certain conditions, dissenting shareholders to retire on the forfeiture of their shares. This proposal, of which distinct notice had been given to all, was adopted at a public meeting of the shareholders. *S.*, a shareholder, who owned shares both by allotment and purchase, and who had executed the deed of settlement, dissented from these conditions, and sought by proceedings in Chancery to have the company wound up. He was not successful in the attempt. An action was brought against him for overdue calls. He defended the action. After a time, and while the litigation with him was still going on, the directors entered into an agreement with him to allow him to retire upon conditions which were not those named in the deed of settlement, nor in the proposal agreed to at the public meeting. No notice of these conditions thus entered into with *S.* was shewn to have been communicated to the other shareholders, but the fact of *S.*'s retirement was

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known to them, and there was no imputation of any fraudulent concealment. The name of *S.* (who had performed all the conditions on which leave to retire was granted to him) was removed from the list of shareholders at the end of 1849. Changes were afterwards made in the mode of carrying on the company's business, and dividends were received; but he was not informed of the changes, he never received a dividend, and he never was called on to take, and never did take, any part in the affairs of the company. In 1861 the company was ordered to be wound up:—

Held (*diss.* Lord *St. Leonards* and Lord *Romilly*), that his name was rightly placed on the list of contributories. *Spackman* v. *Evans* 171

2. COMPANY—An arrangement allowing members of a company to retire from the company under certain conditions therein agreed to by a public meeting of the shareholders, convened after due notice to all the shareholders, is not in itself valid, unless made in accordance with the provisions of the deed of settlement, and if not assented to directly or indirectly, after due notice, by all the shareholders, may be impeached by any one of them. But if the means of notice to all appear sufficient, so as to raise a clear presumption of knowledge and acquiescence, and the arrangement is left unimpeached by any one for a great many years, the shareholder who has been allowed to retire, and whose name has been removed from the lists of the company, will be held to be relieved from his liability as a shareholder. (*Diss.* Lord *Chelmsford*).

An arrangement known among the shareholders as the *Chippenham* arrangement was, in this case, adopted and acted on, with this single exception, that the retiring shareholder did not at once pay the sum for which he was liable, but was allowed to give a bill for the amount, which bill was paid at maturity. The directors then passed a resolution declaring his shares cancelled, and his name was removed from the lists:—

Held (*diss.* Lord *Chelmsford*), that his name could not, after the lapse of years, be put on the list of contributories.

A shareholder who had been allowed to retire, upon terms not consistent with the provisions of the deed of settlement, nor those of the *Chippenham* arrangement, and was therefore held liable to have his name put upon the list of contributories, was not in a better situation than any of the ordinary acquiescing shareholders to complain of what had been done in this case.

The costs were ordered to come out of the general fund. *Smallcombe* v. *Evans* 249

3. ——— Where a general meeting of the shareholders of a company had agreed to certain conditions on which dissenting members were to be allowed to retire from the company, one of which fixed the date at which assent to the arrangement was to be declared:—

Held, that that date was an essential part of the proceeding, and that the directors had no power, after the expiration of that date, to receive proposals and enter into arrangements with any member who desired to retire but had not expressed his wish to do so within the stipulated time.

But (*per* Lord *Cranworth*), where shareholders know that their directors have been exceeding their legal powers and take no steps in the matter, but allow the things done to remain unimpeached for years, they must be taken to have, retrospectively, sanctioned what has been done. *Houldsworth* v. *Evans* 263

4. ——— Where it is clear that the objects of a company, as set out in the memorandum of association, go far beyond what was indi-

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cated in the prospectus, on the faith of which prospectus a person had applied for and obtained shares, he is, unless barred by laches or acquiescence, entitled, on discovering the difference, to have his name removed from the company.

A mere difference in the language of the prospectus and the memorandum would not relieve him from his liability. The question would be, whether the obligations incurred under the two documents were substantially different.

A person who takes shares on the faith of a prospectus the terms of which are materially varied by the subsequent memorandum of association, must claim his exemption from that cause within a reasonable time after the memorandum has been issued; otherwise he will be debarred by his laches from doing so. This especially applies in the case of a contest between the shareholder himself and another shareholder, or between him and the official liquidator.

But this rule of reasonable time will not apply in the case of a contest between the shareholder and a person who prepared the prospectus, and afterwards issued the memorandum of association.

Where, therefore, in May, 1864, *A.* published a prospectus of a proposed company, and *B.* took shares in it, and paid the first deposit, and a memorandum of articles of association was registered in June, and after an inquiry instituted by *B.* in December, 1864, he paid a farther deposit, and an application was afterwards made by a third person to wind up the company, and then, in January, 1865, *B.* applied for and obtained an Order to have his name removed from the register of the company upon the ground that the memorandum varied in many important respects from the prospectus, so as, in fact, to constitute a totally different undertaking, and alleged that till December, 1864, he had never known of the difference between the two documents:—

Held, that an application by *A.* to rescind the order for the removal of *B.*'s name had been rightly refused by the Court below, whatever might be *B.*'s liability as between himself and the official liquidator, or another innocent shareholder, or a creditor of the company. *Downes* v. *Ship* 343

CONDITION OF RETIREMENT FROM COMPANY: *See* COMPANY.

CONSPIRACY: *See* PLEADING. 3.

Conspiracy cannot exist without the consent of two or more persons, and their agreement is *an act* in advancement of the *intention* which each of them has conceived in his mind. *Mulcahy* v. *The Queen* .. 306

CONTRACT: *See* AGREEMENT.

CONTRIBUTORY: *See* COMPANY.

COPYRIGHT—The word "author" is used in the statute 5 & 6 Vict. c. 45, without limitation or restriction, and is therefore equally applicable to foreigners as to British subjects.

An alien friend who, during the time of his temporary residence in a British Colony, publishes, in the *United Kingdom*, a book of which he is the author, is, under the 5 & 6 Vict. c. 45, entitled to the benefit of English copyright.

Under the statute 5 & 6 Vict. c. 45, the first publication of a book must, to secure British copyright to its author, be made in the *United Kingdom*.

Per Lord *Cairns*, L.C.:—The object of the 6th section of the statute was to obtain for the *British Museum* a copy of every book published anywhere under British rule, whether there should be copyright in the book or not.

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British copyright, when once it exists, extends, under the 29th section of the statute, over every part of the British Dominions.

Per Lord *Cairns*, L.C., and Lord *Westbury*:—The protection of the statute is given to every author who first publishes in the *United Kingdom*, wheresoever he may then be resident (*dub.* Lord *Cranworth* and Lord *Chelmsford*). *Routledge* v. *Low* 100

COSTS: *See* COMPANY; PRACTICE.

An appeal was objected to when before the House as incompetent. The objection ought to have been made before the Appeal Committee.

The appeal itself was heard and dismissed with costs, from which would have been deducted the costs, if any, of presenting the objection of want of competency to the Appeal Committee. *Conolly* v. *Luscombe*. *Mooney* v. *Robinson* 139

DAMAGES: *See* MINE; WATER.

DATES: *See* COMPANY.

DEATH OF BOTH PARTIES TO A MARRIAGE: *See* MARRIAGE.

DELAY: *See* COMPANY.

A person who takes shares on the faith of a prospectus the terms of which are materially varied by the subsequent memorandum of association must claim his exemption from that cause within a reasonable time after the memorandum has been issued; otherwise he will be debarred by his laches from doing so. This especially applies in the case of a contest between the shareholder himself and another shareholder, or between him and the official liquidator.

But this rule of reasonable time will not apply in the case of a contest between the shareholder and a person who prepared the prospectus and afterwards issued the memorandum of association. *Downes* v. *Ship* 343

DEVISE: *See* WILL.

DIRECTORS (THEIR POWERS): *See* COMPANY.

DIVORCE: *See* MARRIAGE; PLEADING.

ENGLISH MARRIAGE: *See* MARRIAGE.

EXECUTORS: *See* BANKERS.

EXECUTORY DEVISE: *See* WILL. 1.

FELONY: *See* CONSPIRACY; INDICTMENT.

FOREIGN DIVORCE: *See* MARRIAGE.

FOREIGN JURISDICTION—*Per* LORD WESTBURY:—A foreign Court may settle the conditions on which it will exercise its jurisdiction; those conditions being fulfilled, it may exercise that jurisdiction, but the judgment given under such circumstances cannot claim extra-territorial authority unless pronounced in accordance with the rules of international public law. *Shaw* v. *Gould* 55

"HEIRS OF THE BODY": *See* WILL.

INDICTMENT: *See* PLEADING.

JURY—The 3 & 4 Will. 4, c. 91 (*Irish Jury Act*), makes a clear distinction between disqualification and exemption. Where, therefore, a juryman was returned whose age exceeded sixty years, that fact only ope-

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rated in his favour as an exemption, but was not a ground for challenge as a personal disqualification.

The statute directs a jurors' book to be made up in each year for use in the year following, and declares that such book shall be in use from the 1st of January for and during one year. In November, 1865, at a sitting of a special commission, a panel was returned from the then existing jury book; the jurors were not then called, but the sitting was duly adjourned to the 19th of January, 1866, at which time the trial took place, when the jurors named in the return of November, 1865, were called:—

Held, that this was not a ground of challenge to the array.

One of the jurors, who had been duly returned in November, 1865, was not on the list for 1866:—

Held, that that was not a ground of challenge to him. *Mulcahy* v. *The Queen* 306

"LAWFULLY BEGOTTEN": *See* WILL.

Where there was an English marriage between two English persons, who, however, never lived together, but the husband committed adultery, and some years afterwards consented to go to *Scotland* to found jurisdiction against himself, and did so, and the Scotch Court pronounced a decree of divorce *à vinculo*:

Held, that a Scotch marriage duly celebrated between the divorced wife and an Englishman (who was thenceforth domiciled in *Scotland*), did not give to the children of their union the character of "lawfully begotten," so as to enable them to succeed to property in *England*, for that the Scotch divorce had not dissolved the English marriage.

Lolley's Case (Fac. Coll. 20th March, 1812; Russ. & Ry. 237; 2 Cl. & F. 567), commented on and explained. *Shaw* v. *Gould* .. 55

LEASE: *See* POWER; WILL. 1.

"LEAVE THE HOUSE:" *See* AGREEMENT.

LEGACY: *See* WILL. 2.

If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails.

Lassence v. *Tierney* (1 Mac. & G. 551; 2 H. & T. 115) confirmed.

A testator, by his will, directed his trustees holding his real estate to levy and raise for his five daughters, naming them, the sum of £1000 each:—

Held, that this was in itself an absolute provision for each. *Kellett* v. *Kellett* 160

MARRIAGE: *See* PRACTICE. 2.

A foreign tribunal has no authority, so far as any consequences in *England* are concerned, to pronounce a decree of divorce *à vinculo* in the case of an English marriage between English subjects, unless such subjects are, at the time of such decree pronounced, *bonâ fide* domiciled in the country where that tribunal has jurisdiction, and the suit is prosecuted without collusion.

Quære, whether, supposing collusion to have existed between the parties to a suit for a divorce, in which a decree was pronounced, it can be set up as a ground for invalidating the divorce, and so bastardising the issue of a second marriage after both the parties to the suit are dead.

Per LORD WESTBURY:—*Quære*, whether the claim of the Scotch Courts to dissolve a foreign marriage for adultery is not restricted, by

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Scotch decisions, to adultery committed in *Scotland* itself. *Shaw* v. *Gould* 55

MINE: *See* POWER. 1.

Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages.

But if he brings upon his land any thing which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned.

A. was the lessee of mines. *B.* was the owner of a mill standing on land adjoining that under which the mines were worked. *B.* desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to construct it. *A.* had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages and flooded *A.'s* mine:—

Held, that *A.* was entitled to recover damages from *B.* in respect of this injury. *Rylands* v. *Fletcher* 330

NEGLIGENCE: *See* MINE.

OVERT ACTS: *See* CONSPIRACY; INDICTMENT; PLEADING. 2.

PATRON AND PRESENTEE: *See* CLERGY; PLEADING. 1.

PLEADING—In *quare impedit*, upon a rejection of the patron's presentee, the bishop's plea must state not only that the presentee is not a fit person, but also in what respect he is not fit, and state it in such a manner as will enable the patron to take issue on the objection, and a proper tribunal to judge of its soundness.

An allegation in the plea that the bishop had good reason to believe that the presentee had been guilty of an attempt to commit simony is not sufficient:—

Semble, that a plea alleging presentation by the bishop as on a lapse must allege notice to the patron of the circumstances under which the bishop would so claim to present. *Bishop of Exeter* v. *Marshall* 17

2. ——— *Quære*, whether, supposing collusion to have existed between the parties to a suit for a divorce, in which a decree was pronounced by a Scotch Court in relation to an English marriage, it can be set up as a ground for invalidating the divorce, and so bastardising the issue of a second marriage, after both the parties to the suit are dead. *Shaw* v. *Gould* 55

3. ———: *See* INDICTMENT.

The 11 Vict. c. 12, intituled "An Act for the better Security of the Crown and Government of the *United Kingdom*," declares it to be

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felony to "compass, imagine, invent, devise, and intend to deprive and depose our Lady the Queen," &c., &c. In support of the charge of this offence under the statute, it is sufficient to allege as overt acts that the Defendants conspired, combined, confederated and agreed to commit the offence.

Where there are several overt acts charged in a count, and a judgment is given on a general verdict of guilty on that count, such judgment will be sustained, though some of the matters alleged as overt acts may be improperly so alleged, provided that the count contains allegations of overt acts that are sufficient.

The allegation, in one count, of several different overt acts of felony is not objectionable under the 11 & 12 Vict. c. 12.

Semble, no objection to the caption of an indictment for an allegation that the grand jurors were "sworn and affirmed" can be sustained without shewing that those who were sworn were persons who ought to have affirmed, or that those who were affirmed were persons who ought to have been sworn. *Mulcahy* v. *The Queen* 306

POWER—A gift of a power to lease mines and minerals, following the gift of a life estate in the real property of which they form part, though expressed in general terms, does not of necessity imply a power in the tenant for life to make a lease exceeding the term of his own life.

A. devised his estates to his daughter for her life, without impeachment of waste, and then to her issue, male and female, and in default of such issue, over. The will gave the daughter, or any person in possession under the limitations in the will, power to work or to make a lease of the mines. She was to receive and pay over to trustees the rents and profits of the mines, which were to be applied to the purchase of other estates, of which she was to receive the rents for her own life. While in possession she made a lease reciting the will, and granting a term of sixty years :—

Held, that the lease was not warranted by the power, for that on the whole will it appeared to be the intention of the testator to restrict her to making a lease for her own life only. *Vivian* v. *Jegon* .. 285

2. ——— *A.*, tenant for life in possession, joined with *B.*, the next heir, in the settlement of certain estates. The settlement contained, among other things, a power for *B.*, in case of the death of his first wife and his marrying again, to charge the settled estates with portions for the younger children of his second marriage, the amounts being regulated with reference to the number of children that might be born of the first marriage. The deed contained a proviso that if the brothers of *B.* should, respectively, come into possession of the settled estates, "either before or after their marriage with any woman or women," they might charge all or any part of the estates with "the like sum or sums of money for the portion or portions of their child or children (other than an eldest or only son) as the said *B.* is entitled to do before or after his marriage with any woman or women after the decease of his first-taken wife by virtue of the provision hereinbefore contained :—

Held (*dub.* Lord *Cranworth*), that this was an absolute power, which, with reference to a younger brother of *B.* succeeding to the settled estates, was not subject to the restrictions and contingencies which applied to *B.* himself in making a charge for the children of his second marriage. *Earl of Harrington* v. *Countess* (*Dowager*) *of Harrington* 295

1. PRACTICE: *See* JURY.

M. H. C. instituted a suit in Chancery in *Ireland*, against *C. P. L.*, executor of *T. P. L.*, in respect of an act done by *T. P. L.* in his lifetime. The suit was dismissed. *M. H. C.* appealed to this House

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against the dismissal. Before the appeal could be heard, both *M. H. C.* and *C. P. L.* died. *R. R.* took out letters of administration to *C. P. L. de bonis non* of *T. P. L.*, and *L. M.* took out administration, with the will annexed, to *M. H. C. L. M.* obtained (but not until after a lapse of more than one year from the date of the dismissal), in the Court of Chancery in *Ireland*, an Order to revive the suit as against *R. R.*, and afterwards presented a Petition to this House that the appeal might stand revived as between himself and *R. R.* as administrator *de bonis non*. *R. R.* objected, under these circumstances, to the competency of the appeal. The Appeal Committee ordered the objection to be argued at the Bar of the House :—

Held, that it was too late to take that objection here, and that the proper course for *R. R.* would have been to resist the Order for revivor made in the Court of Chancery in *Ireland*.

The appeal itself was heard and dismissed with costs, from which would have been deducted the costs, if any, of presenting the objection of want of competency to the Appeal Committee. *Conolly* v. *Luscombe*. *Mooney* v. *Robinson* 139

2. PRACTICE—Two persons were, under a deed of settlement after a marriage, made assignees of a life policy upon trusts stated in the settlement, for the benefit of the younger children of the marriage. The husband died intestate. The widow took out letters of administration, and instituted an administration suit, to which the trustees were not made parties, but in which the Court of Chancery in *Ireland* was asked to grant, and did grant, an Order for the payment of the policy money into Court. The insurance office, knowing of the assignment of the policy, refused to obey the Order, and the trustees, on being informed of it, protested against it, and refused to sign receipts for the money. The solicitors for the Plaintiff in the administration suit wrote to them, asking them to give up the trust. They refused, and they again refused to sign the receipts for the payment of the money under the administration suit. A Petition, in the names of the younger children, was then presented to the Lord Chancellor of *Ireland*, representing that the trustees had declined to act in the trust, and it was prayed that they might be removed, and other persons be appointed in their stead. An Order to this effect was made :—

Held, on appeal by the trustees, against these Orders, that these proceedings were altogether irregular; and the cause was remitted, with special instructions.

The costs of the trustees were ordered to come out of the funds of the trust. *Lord Muskerry* v. *Skeffington* 144

3. ———— A Respondent desired to contend that, in one respect, the decree of the Court below was too favourable to the Appellant, but as there was no cross appeal, the House would not hear that point argued. *Kellett* v. *Kellett* 160

PRESENTATION : *See* PLEADING. 1.

PROVISION FOR YOUNGER CHILDREN : *See* POWER.

PUBLICATION : *See* COPYRIGHT.

QUARE IMPEDIT : *See* PLEADING. 1.

REVOCATION : *See* WILL. 2.

SECOND MARRIAGE : *See* MARRIAGE ; POWER. 2.

SHAREHOLDER : *See* COMPANY.

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TENANCY: *See* AGREEMENT.

TENANT FOR LIFE: *See* POWER.

TREASON FELONY: *See* CONSPIRACY; PLEADING.

TRUST: *See* BANKERS; PRACTICE. 2.

USE OF PROPERTY: *See* WATER.

WATER—Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages.

But if he brings upon his land any thing which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned.

A. was the lessee of mines. *B.* was the owner of a mill standing on land adjoining that under which the mines were worked. *B.* desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to construct it. *A.* had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages and flooded *A.'s* mine.

Held, that *A.* was entitled to recover damages from *B.* in respect of this injury. *Rylands* v. *Fletcher* 330

1. WILL—A testator was possessed of two estates in *Ireland*, *Flesk Castle* and *Dick's Grove*. The former he held under a lease for lives renewable for ever; the latter he held in fee. In 1833 he made a will, in which he said, "I give, devise, and bequeath to my son *John Coltsmann* all those my *property*, lands, tenements, and premises at and about *Flesk Castle*," together with plate, furniture, &c. "I also devise and bequeath to my son *J. Coltsmann* my lands, tenements, and premises at *Dick's Grove*." All his estates, &c., were made chargeable with an annuity to his wife. He afterwards made a codicil, in which he said, "If it should happen that my son *J. Coltsmann die without heirs of his body* lawfully, &c., in that case, and in default of such heirs, I do hereby devise and direct that my lands, &c., at *Flesk Castle*, and the plate and furniture in my will specified, also my lands, &c., at *Dick's Grove*," all charged with the annuity to his wife, "and also with a reasonable provision, made with my consent, by my son for his wife, payable for her life, shall *at my son's death* descend and be transferred to my grandson *Daniel Cronin*, his heirs, &c., for ever, the heir for the time being to add the name of '*Coltsmann*' to the name of '*Cronin*.'" In the event of the contemplated death of the son without heirs, a charge of £6000 was created in favour of a married daughter. The son never had any child. While in possession he executed disentailing deeds of both estates, and by will devised them to his wife:—

Held, that reading the will and codicil together, *John Coltsmann* took the estate of *Flesk Castle* in fee, with an executory devise over to *Daniel Cronin*, in the event that happened of *John Coltsmann* dying without heirs of his body living at his death; and, as to *Dick's Grove*,

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that as the law then (1835) stood, the gift was a gift of that estate to *John Coltsmann* for life only, with a contingent remainder to *Daniel Cronin*, in the event of *John Coltsmann* dying without heirs of his body living at his death. *Coltsmann* v. *Coltsmann* 121

2. WILL—If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails.

Lassence v. *Tierney* (1 Mac. & G. 551; 2 H. & T. 115) confirmed.

A testator, by his will, directed his trustees holding his real estate to levy and raise for his five daughters, naming them, the sum of £1000 each:—

Held, that this was in itself an absolute provision for each.

The will directed that the sum of £1000 each should be raised "subject to the provisoes thereinafter expressed:" *i.e.*, the trustees were to permit each daughter to take the interest for life—in case she should marry, her husband was to take the interest for life—and after the decease of any daughter unmarried or without issue, the principal was to be applied amongst all or any of his other children, &c., in such shares as the daughter dying should appoint, and, in default of appointment, amongst the surviving children or their issue in equal shares. By a codicil he revoked his will "so far as the said sum to each of my said daughters is given absolutely, and I declare that in the event of any of my said daughters remaining unmarried, she shall only be entitled to an interest for her natural life," and he then confirmed the gift, "subject to the restriction aforesaid."

Held, that these provisions did not qualify the gift, except so far as the restriction as to remaining unmarried was concerned.

Held, also, that, notwithstanding the revocation, by the codicil, of the absolute gift, the Court below had properly declared the survivor entitled for her life to a distributive share of her deceased sisters' interests in the sums given to them.

The testator resided in a house at *W.* By his will he recited that he had made a lease of this house and certain lands adjoining, and he directed his trustees to hold the house and lands for the lives of his five daughters and their survivors, subject to the yearly rent of £2 10*s.* per annum, his object being to provide them with a residence. By a codicil he declared that his (then surviving) daughters should have "the house at *W.* and the lands as laid out, furniture, and plate at their disposal:"—

Held, that reading the will and codicil together, the surviving daughter was entitled to have the house and land free from any rent, and to have the plate and furniture absolutely.

The Respondent desired to contend that, in one respect, the decree of the Court below was too favourable to the Appellant, but as there was no cross appeal, the House would not hear that point argued. *Kellett* v. *Kellett* 160

YOUNGER CHILDREN, PROVISION FOR. *See* POWER. 2.

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